

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 8490/2016

VUYANI EXCELLENT DYALO

Applicant

And

MNQUMA LOCAL MUNICIPALITY

1st Respondent

THE TRAFFIC OFFICER, ZAMILE LOLO

2nd Respondent

JUDGMENT

BROOKS J

[1] The subject of this application is an ISUZU KB 300 DTEQ motor vehicle with registration letters and number F... 8.... EC (the motor vehicle) which belongs to the applicant. It is common cause that the motor vehicle was seized by members of the Traffic Police of the Mquma Local Municipality on 8 February 2016 and that it remains in their possession.

[2] After making unsuccessful attempts to regain possession of the motor vehicle, on 11 March 2016 the applicant launched the present application. The notice of motion seeks a *mandament van spolie*, a final interdict and an order for costs.

[3] The application was opposed by the respondents and a full exchange of affidavits has occurred.

LEGAL PRINCIPLES

[4] The purpose of a *mandament van spolie* is the speedy restoration of possession to a person who has been unlawfully deprived thereof. It is also designed to prevent persons from resorting to self-help or from taking the law into their own hands. Consequently, as a possessory remedy, it offers only temporary relief and is not aimed at the restoration of rights. The underlying principle is that possession must be restored before the court will decide, if necessary competing claims to the object.¹

[5] The maintenance of peace, order and stability within society, wherein persons enjoy a constitutional right to hold property without the threat of unlawful deprivation thereof, would not be possible were the law to countenance persons resorting to self-help to deprive others of the possession of their property.²

¹ TSWELOPE NON-PROFIT ORGANISATION AND OTHERS v CITY OF TSWANE METROPOLITAN MUNICIPALITY AND OTHERS 2007 (6) 511 (SCA) par [21].

² NINO BONINO v DE LANGE 1906 TS 120.

[6] All that an applicant has to prove is possession of a kind which warrants the protection accorded by the *mandament van spolie* and that the applicant was unlawfully ousted.³ It matters not that the spoliator might have a stronger claim to possession than the person spoliated or that the latter indeed has no right to possession.⁴

[7] The following defences are recognised in spoliation proceedings:

- the applicant was not in peaceful and undisturbed possession of the thing in question at the time of the dispossession;
- the dispossession was not unlawful and therefore did not constitute spoliation;
- the restoration of possession is impossible; and
- the respondent acted within the limits of counter-spoliation in regaining possession of the article.

[8] In order to obtain a final interdict as contemplated in addition to his *mandament van spolie*, the applicant must establish the following:

- that there is a clear right on the part of the applicant;
- an injury actually committed or reasonably apprehended; and
- the absence of any other satisfactory remedy.⁵

³ YEKO v QANA 1973 (4) SA 735 (A) 739 D-G.

⁴ BON QUELLE (EDMS) BPK v MUNISIPALITEIT VAN OTAVI 1989 (1) SA 508 (A) 512 A – B.

⁵ SETLOGELO v SETLOGELO 1914 AD 221 at 227.

[9] Where the authorities⁶ pertaining to the requirements for a final interdict have consistently referred to the requirement to establish a clear right as a requirement to establish, on the balance of probability, facts and evidence which prove that the party has a definite right in terms of substantive law, the reference is rather to a right which is clearly established.⁷ Whether the applicant has a right is a matter of substantive law; whether that right is clearly established is a matter of evidence.⁸

[10] As the interdict is final in nature, the court is enjoined to consider the grant of relief only if the facts alleged on behalf of the applicant which are admitted by the respondents in the answering affidavit, together with the facts expressed by the respondents therein justify such relief.⁹ The position may be different if the respondents' version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.¹⁰

THE FACTUAL POSITION

[11] The respondents opposition to the application is founded upon an assertion that the seizure of the motor vehicle was lawful. It is alleged that the motor vehicle was being used in the commission of an offence in that it was being driven recklessly and negligently, causing a danger to the public and secondly that it was being used to cause a nuisance to the public in

⁶ NIENABER v STUCKEY 1946 AD 1049 at 1053 and 1054; MOSII v MOTSEOAKHUMO 1954 (3) SA 919 (A) and DE VILLIERS v SOETSANE 1975 (1) SA 360 (E) at 362.

⁷ EDREI INVESTMENTS 9 LTD (IN LIQUIDATION) v DIS-CHEM PHARMACIES (PTY) LTD 2012 (2) SA 553 (ECP) 556 B – C.

⁸ ERASMUS, SUPERIOR COURT PRACTICE, SUPPLEMENTARY VOLUME, page E8 – 6D.

⁹ PLASCON EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A) 634 – 635.

¹⁰ NATIONAL DIRECTOR OF PUBLIC PROSECUTION v ZUMA 2009 (2) SA 277 (SCA) par [26].

contravention of the Mquma Local Municipality by-laws. Accordingly the respondents place reliance upon the provisions of s20 (a) read with the provisions of s22 (b)(ii) of the Criminal Procedure Act 51 of 1977. The respondents develop the defence of lawfulness to allege that in these circumstances the seizure of the motor vehicle without a search and seizure warrant was lawful. It is alleged that it will be used in criminal proceedings and only the criminal court can release the motor vehicle.

[12] A reading of s20 of the Criminal Procedure Act 51 of 1977 demonstrates that the motor vehicle does not fall within the ambit of articles which can be seized by the State. Even if the respondents version were to be accepted that the motor vehicle was being driven recklessly and negligently, it is apparent from the answering affidavit that the motor vehicle was not being driven by the applicant. He was merely one of the passengers in the motor vehicle. In such circumstances, allegation that the applicant was arrested and a criminal case was opened causes some surprise. No case number for any pending criminal proceedings is provided by the respondents in support of this allegation. Even if it had been, the motor vehicle would never be utilised in the criminal proceedings as evidence. The traffic officers' account of the incident would be sufficient to prosecute the applicant.

[13] By the same token, the allegation that the applicant was causing a nuisance to the public in contravention of the Mquma Local Municipality by-laws is also untenable. A scrutiny of the applicant's conduct does not identify it as falling within the realm of the definition of nuisance. He was not the driver of the motor vehicle. What is perceived to be a nuisance must be recognised and denounced by the owners of immovable property and not by traffic officers.

[14] It follows that in my view the defence that the seizure of the motor vehicle was lawful cannot be sustained.

[15] The entitlement of the applicant to a final interdict can be dealt with shortly. The right which the applicant asserts is the right to peaceful and undisturbed possession of the motor vehicle. The injury against which he seeks the protection of the interdict is the unlawful dispossession thereof as demonstrated by the members of the Traffic Police on 8 February 2016. It is plain that in the circumstances of this matter, no satisfactory alternative remedy is available to him.

[16] No reason exists why the respondents would not be able to prosecute the applicant or take lawful steps to seize his motor vehicle if they were advised that the lawful grounds existed for such action. Accordingly, the protection afforded the applicant by the issue of the interdict is only security against further unlawful activity and cannot in any way prejudice the respondents.

COSTS

[17] The respondents allege further that, whatever the outcome in the matter, the applicant should not succeed in obtaining an order that costs be paid by the respondents beyond 8 April 2016. The rationale for this submission is that on 8 April 2016 the applicant ought to have accepted a settlement proposal advanced for his consideration on behalf of the respondents. This proposal was that the vehicle

be returned to the applicant and that each party pay their own costs. Not only does the ease of the gesture of returning the motor vehicle appear to be in stark contrast to the assertion that the motor vehicle can only be returned by order of the criminal court, but no basis seems to exist which would justify the view that the applicant ought to have accepted the proposal that he pay his own costs. The launch of the application was essential before any proposal was made for the return of the motor vehicle. In my view, the applicant was entitled to pursue the application, including a full costs order.

ORDER

[18] The following order will issue:

- “1. The respondents’ seizure on 8 February 2016 of the applicant’s ISUZU KB 300 DTEQ motor vehicle with registration letters and number F.... 8.... EC is hereby declared to unlawful;
2. The respondents are hereby directed to restore possession forthwith of the motor vehicle referred to in paragraph 1 of this order to the applicant;
3. The respondents are hereby interdicted and restrained from any further unlawful interference with the motor vehicle referred to in paragraph 1 of this order;
4. The respondents are hereby directed to pay the costs of this application the one paying the other to be absolved, on a party and party scale.

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances:

For the applicant: ADV S Y MALUNGA

**Instructed by Makangela Ntungani Inc.,
51 Victoria Street
MTHATHA**

**For the respondent: MS T. MADYIBI of
Mvuzo Notyesi Inc.,
2nd Floor
T H Madala Chambers
14 Durham Street,
MTHATHA**

Date heard: 8 September 2016

Date Delivered: 9 September 2016