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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

Case Number: 3488/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 2024-06-14

SIGNATURE

In the matter between:

LESIBA JACK LEDWABA

APPLICANT

And

PROVINCIAL COMMISSIONER SAPS (LIMPOPO)

FIRST RESPONDENT

LUCKY RAMASHALA

SECOND RESPONDENT

SPCA MOKOPANE

THIRD RESPONDENT

MINISTER OF POLICE

FOURTH RESPONDENT

MUNICIPAL MANAGER OF MOGALAKWENA

LOCAL MUNICIPALITY

FIFTH RESPONDENT

MEC FOR COOPERATIVE GOVERNANCE HUMAN

SETTLEMENT AND TRADITIONAL AFFAIRS

Neutral citation: *Ledwaba v Provincial Commissioner of the SAPS, Limpopo* (3488/2020) [2024] ZALMPPHC 59 (14 June 2024)

Coram: Kanyane AJ

Heard: 14 November 2023

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' e-mail addresses. The date for the hand-down is deemed to be 14h30 on 14 June 2024.

Summary: Interpretation of legislation – Limpopo Pounds Act, 3 of 2002 - Subsidiarity barring direct reliance on s 25 of the Constitution – Declaratory relief that the impoundment and sale of the applicant's cattle was unlawful granted – Applicant seeking an order for damages in motion proceedings — requirements for such relief not made out.

ORDER

1. It is declared that:

1.1. The applicant was the owner of 15 head of cattle impounded and removed by the third respondent, at the instance of the second respondent, on or about 13 June 2017 at or near Mapateng village, Ga-Mashashane, to the pound operated by the third respondent at Mokopane (the impounded cattle).

1.2. The impoundment of the impounded cattle by the third respondent, at the

instance of the second respondent, was unlawful.

1.3. The third respondent's sale of the impounded cattle on or about 13 July 2017 was unlawful.

2. The third and fourth respondents shall jointly and severally pay the applicant's costs occasioned by this application, the one paying the other to be absolved, including the costs of counsel on Scale B.

3. Save as aforesaid, the application is dismissed.

JUDGMENT

Kanyane, AJ Introduction

[1] This case is about the impoundment and sale of stray cattle. The applicant's essential complaint is that the respondents are responsible for the unlawful impoundment and sale of 15 head of cattle belonging to him in contravention of the provisions of s 25 of the Constitution and the Limpopo Pounds Act, 3 of 2002.¹

[2] The applicant seeks declaratory orders declaring that the impoundment and sale of his cattle was unlawful for want of compliance with the provisions of the Act and violated his rights in terms s 25 of the Constitution.² Consequent to these declaratory orders, he seeks orders (a) that the respondents are liable to compensate him for the damages he has suffered due to the loss of his cattle,³ and (b) that the matter be postponed *sine die* for a determination of the quantum of the damages to be paid to him. The participating respondents oppose the relief sought on various grounds.

¹ Unless otherwise specified, all references to a section are to a section in the Act.

² Applicant's Amended Notice of Motion (NoM), par 1 and 2.

³ NoM, par 10.

The parties

[3] The applicant is a resident of Moshate Section, Ga-Mashashane village, in the Capricorn district.

[4] The first respondent is the Provincial Commissioner of the South African Police Service for the Limpopo province.⁴ The second respondent, Capt. Lucky Ramashala, is a police officer attached to the SAPS' Provincial Stock Theft Unit in Polokwane.

[5] The third respondent is the Society for the Prevention of Cruelty to Animals: Mokopane. The SPCA is registered with the National Council of Societies for the Prevention of Cruelty to Animals in terms of the Societies for the Prevention of Cruelty to Animals Act, 169 of 1993.

[6] The fourth respondent is the Minister of Police, who is the executive authority of the SAPS required to be cited as nominal respondent in proceedings instituted against the SAPS by s 2(1) of the State Liability Act, 20 of 1957. I refer to the Minister, the Provincial Commissioner and Capt. Ramashala collectively as the *SAPS respondents*.

[7] The fifth respondent is the municipal manager of the Mogalakwena Local Municipality, a local municipality established in terms of the Local Government: Municipal Structures Act, 117 of 1998. Pounds are a local government matter over which the provincial government exercises exclusive legislative competence – see Part B of Schedule 5 to the Constitution.

[8] The sixth respondent is the MEC responsible for cooperative governance, human settlements in the Limpopo Provincial Government. The MEC is cited in her capacity as the executive authority of the Limpopo Department of Cooperative Governance, Human Settlements, and is charged with the administration of the Act.

⁴ Section 6(2) of the South African Police Service Act, 68 of 1995, requires the National Commissioner to appoint a Provincial Commissioner of the Service for each province.

The pleaded facts

[9] Much of the argument in this case concentrated on whether the compensation relief sought could properly have been brought by way of motion proceedings. The respondents – especially the SPCA – contend this is impermissible as there were foreseeable disputes of fact. I deal with this issue first.

[10] The general rule is that motion proceedings are all about deciding questions of law on undisputed facts (*National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) (2009 (1) SACR 361; 2009 (4) BCLR 393; [2009] 2 All SA 243; [2009] ZASCA 1) para 26); *Ndlozi v Media 24 t/a Daily Sun and Others* 2024 (1) SA 215 (GJ) para 20). The affidavits setting out those facts are both the statement of the parties' respective cases and the evidence for the truth of the propositions stated in the affidavits. Unless the court can decide the application on the undisputed or common-cause facts, it must dismiss the application or refer any material dispute of fact to trial (*Ndlozi v Media 24*, above).

[11] For the for the reasons given by Wilson J in his comprehensive judgment in *Ndlozi v Media 24* (which surveyed the relevant authorities and with whose reasoning I respectfully agree), I approach this matter on the basis that there is no legal or doctrinal bar for a claimant – in appropriate circumstances where liability can properly be determined on the papers, to seek an order on motion that a respondent is liable to him in damages together with in order that only the quantum for these damages be decided at a trial in due course (*Ndlozi v Media 24*, at paras 20 – 26). This seems to me to conduce to the interests of judicial economy in a country where judicial resources are scarce and overstretched.

[12] As my analysis of the undisputed and common cause facts will show, the real disputes of fact between the applicant, the SAPS respondents and the SPCA are limited, and it is possible to determine the relief sought on this basis. Naturally, where there is a genuine dispute of fact, I have preferred the respondents' version except where such version is so far-fetched or clearly untenable that the court is justified in rejecting it on the papers (see *Plascon-Evans Paints Ltd v Van Riebeeck*

Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634H – 636B; *Khumalo v Independent Electoral Commission of South Africa* (0025/24EC) [2024] ZAEC 20 (12 June 2024) at para 7.).

[13] Since the applicant elected to bring these proceedings on motion, he assumed the risk that some of his claims may be dismissed where foreseeable disputes of fact arise (*Ndlozi v Media*, above, par 24).

[14] It is common cause between the applicant and the SAPS respondents that the applicant was the owner of 15 head of cattle which were kept at his home at Ga-Mashashane. Since the applicant lived in Alexandra, the cattle were in the custody of a herdsman, who was also the applicant's brother, Mr Khunkhwana Phineas Ledwaba.

[15] The applicant put up a supporting affidavit deposed by the herdsman on 15 March 2018, in which the latter confirms that on 10 July 2017, he released the cattle in issue to the grazing fields. When he went to drive the cattle back home that afternoon, he could not locate them. The next day, he launched a search for them at the grazing fields and at neighbouring villages, without success, until he was contacted by one David Matlwa, who advised him that certain cattle matching the description of the missing cattle had been “loaded” by Capt. Ramashala at Mapateng village. The next day, he contacted Capt. Ramashala, who confirmed having taken the cattle to the pound as people thought the cattle belonged to white farmers because they did not look like the local cattle.

[16] The statement proceeds:

“After a while [Capt. Ramashala] came to take me to the pound so that I will (sic!) identify. On my arrival at the pound I found is cattle of my brother still there. He then took me back home when we back home he told me that if the cattle exceed a stipulated time they will be sold so that the pound master to cover the costs.”

[17] The applicant also put up two affidavits deposed to by Capt. Ramashala

under Mashashane SAPS Enquiry No.: 4/7/2017 as “A9” and “A10”, respectively. The first statement was deposed to on 31 January 2018, in which Capt. Ramashala states that at about 18h00 on 13 July 2017 (i.e., two days after the applicant’s cattle went missing) he was travelling from Rietfontein to Mapateng when he was stopped by boys who alerted him to cattle that were unknown in the area. They directed him to the cattle, which were 15 in number, and of which only two were branded. He caused these cattle to be kraaled at Mapateng crush pen where “*stock owners were summoned to view them*”. The cattle not having been identified, he “*summoned the pound master to collect the cattle and impound them so that they are safe*”. He estimated the value of the animals at R100 000 and concludes by stating that the animals “*are presently at SPCA Mokopane*”.

[18] The second statement is undated, but was certainly deposed to after the first statement, given its numerical reference and its contents. In it, Capt. Ramashala deals with his interactions with the applicant and his brother after the impoundment of the cattle. He says that after the impoundment of the cattle, he was telephoned by the applicant’s brother who indicated that the cattle that he had impounded could be those of his brother, the applicant. He advised the applicant’s brother to go view the cattle at SPCA Mokopane and come back to him. Capt. Ramashala – so his statement continues – then approached one Mr Mfanana Ledwaba and his son, to whom he related the story of the impounded cattle. Mr Mfanana Ledwaba told him that the impounded cattle could be those of the applicant, as his cattle were missing, and that the applicant’s brother was looking after the cattle.

[19] The statement continues. According to it, Capt. Ramashala and Mr Mfanana Ledwaba drove to the home of the applicant’s brother, where Capt. Ramashala enquired from the applicant’s brother whether the latter had gone to view the cattle. The response he received was that the applicant’s brother had telephoned the applicant, “*who did not show interest to come back home so that they proceed to SPCA to view the cattle*”. At Capt. Ramashala’s request, the applicant’s brother telephoned the applicant, and Capt. Ramashala spoke to him. Capt. Ramashala’s account of that conversation is as follows:

“I told [the applicant] to view cattle at SPCA and if the cattle are his

to take them as they are being charged.

His response was that SPCA is keeping those cattle from him so I should not bother. I then left him.”

[20] According to the statement, Capt. Ramashala took the applicant’s brother to the SPCA the following day to view the impounded cattle, and the latter confirmed that the cattle belonged to the applicant. Capt. Ramashala then told the applicant’s brother to talk to the applicant to go to the SPCA to identify the cattle. The statement concludes, in relevant part:

“[The applicant] did not go to identify the cattle until the SPCA auctioned the cattle.”

[21] The applicant also put up a form on the SPCA’s letterhead, which indicates that the SPCA received 15 stray cattle of “*mixed*” colours and markings, 13 female and two male, from Capt. Ramashala on 13 June 2018. A manuscript note on the form says “*sell by 14/7/2017*”. Further down the page, another manuscript note says “*R37 200 – 31 days excluding transport*”.

[22] Another piece of evidence put up by the applicant is a tax invoice issued by Vleissentraal Bosveld (Pty) Ltd dated 13 July 2017 in respect of an auction of 15 cattle, including 8 cows, 5 heifers and 2 oxen on that date at an auction in Bela-Bela.

[23] The final piece of evidence that the applicant relies on is a transcript of an e-mail chain between the SPCA ([m\[...\]](#)) to various members of the SAPS Provincial Stock Theft Unit on 11 August 2017, relating to two herds of cattle apparently entrusted to the SPCA by the SAPS. The relevant portion of the e-mail communication (which has not been denied by the SPCA) says:

“15 Cattles from Mashashane was at our pound for 30 days and was sold at Warmbaths Auction on 13/7/2017. the 21 days lapsed on 4/7/2017”.

As we will see below, this reference could only have been to s 16(1), which

authorises a Poundmaster to advertise the sale of impounded stock that is not released within 21 days of impoundment.

[24] Both the SAPS respondents and the SPCA dealt fully with the founding affidavit supporting affidavits and annexures thereto presented in support of the application.

[25] Capt. Ramashala, who deposed to the answering affidavit on his own behalf and on behalf of the Provincial Commissioner, did not deny the contents of his statements put up by the applicant.⁵ The Minister made common cause with the Provincial Commissioner and Capt. Ramashala.

[26] To recapitulate: as between the applicant and the SAPS, there is very little dispute on the facts. These facts are common cause:

(a) The applicant was the owner of 15 head of cattle which were kept at his home at Ga-Mashashane, which were in the custody of his brother.

(b) The applicant's brother let the cattle out to graze on 10 July 2017, and could not find them later that afternoon.

(c) The next day, 11 July 2018, the applicant's brother went on a search of the cattle in the grazing fields and in neighbouring villages, without success.

(d) At about 18h00 on 13 July 2018, Capt. Ramashala was travelling to Mapateng when he was flagged down by boys who alerted him to cattle that were unknown in the area. He then caused the cattle to be kraaled at Mapateng crush pen where local stock owners were summoned to view them.

⁵ See Founding Affidavit (**FA**), paras 12 – 20; not denied in SAPS Answering Affidavit (**SAPS AA**), paras 7 – 16.

(e) When cattle were not identified, he summoned the Poundmaster, i.e., SPCA Mokopane, to collect the cattle and impound them so that they are safe.

(f) Sometime thereafter, Capt. Ramashala took the applicant's brother to the SPCA to view the impounded cattle, and the latter (at least to Capt. Ramashala) confirmed that the cattle belonged to the applicant.

(g) Capt. Ramashala telephonically requested the applicant to attend at SPCA Mokopane to identify the cattle. The applicant did not.

(h) The cattle were sold by the SPCA at a public auction at Bela Bela on or about 13 July 2017.

[27] The SPCA admits that it impounded 15 cattle in the manner described by the applicant,⁶ but specifically denies (a) that the applicant was the owner of those cattle and (b) that any representative of the applicant viewed the cattle at the pound.⁷

[28] In view of the SPCA's admission that it impounded 15 cattle at the request of Capt. Ramashala and in the manner described by the applicant, its denial of the applicant's allegation that he was the owner of the cattle does not raise a proper dispute of fact that would require the matter to be decided on the SPCA version. There is string of cogent evidence, including evidence under oath from Capt. Ramashala, the police officer who procured the impoundment of the cattle by the SPCA, that both the applicant and his brother asserted ownership of the impounded cattle (the latter on behalf of the applicant), and that shortly thereafter, Capt. Ramashala took the applicant's brother to the SPCA's pound, where the applicant's brother identified the cattle as belonging to the applicant and entrusted to his care.

[29] Neither does the SPCA deny that it caused the impounded cattle to be sold

⁶ SPCA's AA, para 19

⁷ SPCA's AA, para 13.1

at an auction at Bela Bela on 13 August 2017 as indicated in the invoice already described.⁸ When confronted with the e-mail where its representative confirmed the sale of the impounded cattle,⁹ the answer by the SPCA's deponent was that:

"I have personally interviewed all employees and officials at the pound and state in the strongest of terms that if the pound was indeed visited by [Capt. Ramshala] and the brother of the applicant, which is still denied, they did so without the assistance or attendance to any query by any official of the pound."

[30] I return below to the impact of this latter denial on the applicant's compensation relief. However, for present purposes there is, in my view, is no proper dispute before me that the SPCA's behest, the applicant's cattle were impounded by the SPCA on 13 June 2017 and later sold by it at a public auction on 13 July 2017.

[31] It is against this factual background that I proceed to examine of the relevant provisions of the Act.

The Act

[32] A brief outline of the provisions of the Act will conduce to an understanding of the scheme of the Act and its application to these facts.

[33] The MEC may, at the request of a Municipality, establish for such Municipality one or more municipal pounds (s 2(a)). The MEC exercises oversight over the control and maintenance of such pounds (s 3) and may abolish any such pound (s 4). A municipal pound established in terms of the Act must be erected and maintained by the Municipality concerned out of monies appropriated by the Municipality for that purpose.

[34] A municipality must appoint a Poundmaster for each municipal pound who

⁸ The SPCA says this in para 21 of its AA

⁹ FA, para 20; annexure "LJL10"

must, as far as possible, be an employee of that Municipality (s7(2)). In response to the SPCA's contention in its answering affidavit that it was acting as a Poundmaster appointed as such in terms of s 7(2) by the Mogalakwena Local Municipality, the applicant caused that Municipality's municipal manager to be joined as the fifth respondent.

[35] The Poundmaster must receive all stock tendered for impoundment in accordance with the Act (s 8(a)); he must issue an official receipt to every person tendering stock or impoundment (s 8(b)); he must forthwith, in such a manner that he may deem expedient, notify the owner of the impounded stock, if the name and address of the owner known to him (s 8(c)); and he must submit the prescribed returns (s 8(g)).

[36] The Act defines the *owner*, in relation to stock, to include the person who is in lawful possession of that stock (s 1, sv "*owner*"). In this case, the applicant's brother clearly qualified as the owner of the cattle for the purposes of the Act.

[37] Subject to the provisions of the Act, a member of the SAPS who on any public road finds stock that is not under proper supervision and control or who at any place, finds any stock whose presence at such a place is contrary to law, may impound such stock or cause such stock to be impounded – see s 9(1).

[38] The Poundmaster is responsible for feeding the impounded stock, and the costs thereof must be recovered in terms of the Act (s 11). Any person tendering stock for impoundment must at the same time furnish to the said Poundmaster (a) the name and address of the person tendering stock, the owner of the land on which such stock was found trespassing and the owner of the livestock, if known; (b) the name of the place where the stock was found trespassing; (c) an indication of the circumstances in which the stock was found and whether the stock was at the place concerned contrary to any law; or particulars of any damage caused by the stock.

[39] A Poundmaster must release any impounded stock if requested by the owner or authorized agent of the owner of such stock against payment in full of all moneys, costs and compensation due, in respect of such stock, in terms of the Act; and if the

person claiming ownership of the impounded stock or agent proves ownership of such stock by means of documents and or marks on the said stock to the satisfaction of the Poundmaster (s 15(1)).

[40] Section 16 deals with the advertisement and sale of stock by public auction. Its relevant provisions of section 16 read:

“(1) If impounded stock is not released within 21 days from the date of impoundment, the Poundmaster must with the approval of the Head of Department or Municipal Manager as the case may be, and by notice in the prescribed form, advertise the intended sale of such stock by public auction.

(2) The Poundmaster must:

(a) make the advertisement:

- (i) at least seven days before such public auction;
- (ii) at the pound concerned or at the nearest auction site;
- (iii) in the *Gazette* in the official languages used in the Province; and
- (iv) in a newspaper circulating in the area in which the pound concerned is situated, in at least two official languages.

(b) furnish a copy of such notice to the nearest Police Station and to the Poundmaster of every pound within a radius of 30 kilometers from the pound concerned.

(c) paste a copy of such notice on the notice board at the pound concerned and at the office of the Head of

Department.

(3) All stock offered for sale at a public auction in terms of this Act, must be sold for cash without reserve to the highest bidder.”

[41] If the impounded stock is sold by public auction under the Act, the Poundmaster must in respect of such stock deduct from the proceeds of the auction sale all moneys, costs, allowances and compensation recoverable in terms of the Act (s 19).

[42] The balance arrived at after deduction of all fees, allowances, costs and compensation from the proceeds of the public auction accrues to the Municipality or to the Government, as the case may be (s 19(3)).

[43] Finally, the Act provides a procedure for the owner of stock impounded and sold at an auction to claim the proceeds of that pound auction. In terms of s 20, the Poundmaster who sold the stock by public auction in terms of the Act may, if the owner of the sold stock applies for such proceeds within 12 months of the auction, and upon submission of satisfactory proof of ownership in respect of the stock, order that compensation equal to the balance arrived at after deduction of all fees, allowances, costs and compensation referred to in s 19(3) be paid to the owner by the Municipality or the Government, as the case may be.

[44] This exposition of the provisions of the Act now leaves the way clear to evaluate the applicant’s claims. I do so under five headings. First, I consider whether the claim for a declaratory order that the impoundment and sale of his cattle violated his s 25 rights to property is competent. Second, I consider the claimed declarator to the effect that the impoundment and sale of the cattle was unlawful on account of non-compliance with the relevant provisions of the Act. Thirdly, I consider the claim for Capt Ramashala’s committal to prison. Fourthly, I consider the compensation relief. Finally, I consider the issue of costs.

The constitutional breach relief is impermissible.

[45] The applicant seeks an order declaring that his s 25 rights have been violated by the impoundment and sale of his cattle.¹⁰ Section 25(1) provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. The Act is clearly a law of general application in this province, which permits the deprivation of livestock owners to their stock in certain circumstances.

[46] The Act regulates *inter alia* how stray livestock is to be dealt with in this province. Pound legislation is firstly aimed at establishing a proper order to deal with stray livestock. For this reason, such livestock may be impounded and, if not claimed in terms of the mechanisms of the Act, may be sold by the Poundmaster by public auction. The Poundmaster is entitled to recover his costs from the proceeds of the sale and is required to remit the balance to the Municipality.

[47] The Act clearly contemplates the deprivation of ownership to livestock in these circumstances. But it also goes to some length to protect the proprietary rights and interests of owners of the impounded stray livestock. For instance, the Act requires the person tendering the stock for impoundment to *inter alia* furnish the Poundmaster with the name and address of the owner of the stock, if known; the Poundmaster must notify the owner of the impoundment, if his details are known; if the stock is not released within 21 days of impoundment, the Poundmaster must sell the stock by public auction, but must *inter alia* advertise the intended sale widely. These provisions are all intended at protecting the proprietary rights of the owner of impounded livestock.

[48] The applicant does not contend that the Act permits arbitrary deprivation of property. In fact, he relies on alleged non-compliance with the Act for his claims.

[49] This being the case, I must decline to consider this prayer because it is precluded by the principle of subsidiarity, “*the judicial theory whereby the adjudication of substantive issues is determined with reference to more particular, rather than more general, constitutional norms*”. See *SAHRC obo SA Jewish Board*

¹⁰ Amended Notice of Motion, prayer 2

of *Deputies v Masuku* 2022 (4) SA 1 (CC) (2022 (7) BCLR 850; [2022] ZACC 5) at para 102.

[50] The principle of subsidiarity was explained in the following terms by the Constitutional Court in *S v Mhlungu and Others* 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793; [1995] ZACC 4) (*Mhlungu*) para 59 –:

“Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.’ Ultimately, the effect of the principle is that it operates to ensure that disputes are determined using the specific, often more comprehensive, legislation enacted to give effect to a constitutional right, preventing them from being determined by invoking the Constitution and relying on the right directly, to the exclusion of that legislation.”

[51] Thus construed, a direct reliance on s 25 of the Constitution is impermissible. It follows that the applicant is not entitled to a declaratory order that his section 25 rights have been violated.

Was the impoundment of the applicant’s cattle lawful?

[52] It is common cause that Capt. Ramashala “summoned” the SPCA to impound the applicant’s cattle at Mapateng village, and the SPCA complied. Capt. Ramashala therefore caused the stock to be impounded by the SPCA as contemplated in s 9(1)(b)(iii).

[53] The applicant put the lawfulness of the impoundment squarely in issue in his notice of motion, but the evidence of such unlawfulness in the founding affidavit was scant, to be charitable of the applicant.

[54] The SPCA’s answer to this was that it had been duly appointed as Poundmaster “for the Municipal district of Mokopane and in its capacity as appointed

Pound master, had authority to act".¹¹ In support of this allegation, the SPCA put up a letter dated 19 February 2018 (some eight months after the cattle were impounded and sold) from the municipal manager, which first indicates that the agreement between the Municipality and the SPCA expired on 30 June 2017 and that, "[p]ending approval of the Municipal Council, you shall continue to operate a Municipal pound on the same terms and conditions as per the agreement dated 18 July 2012 bearing in mind that the Municipal pound under your administration can only be utilized for the Impoundment of animals within the boundaries of Mogalakwena Municipality only".

[55] In reply, the applicant sharply raised the issue that Capt. Ramashala had caused the cattle to be impounded by the SPCA, which was not a Poundmaster for the area of Ga-Mashashane, which falls within the Polokwane Local Municipality, and that the SPCA had no jurisdiction to impound the stock. As I have already observed, the Act requires every Municipality to appoint a Poundmaster for each municipal pound. The respondents did not rejoin on this point, and the matter was argued on this basis.

[56] The general principle is that an applicant seeking relief on motion should set out all the grounds which he says entitle him to relief, and he is not generally allowed to supplement those grounds in reply. The learned authors of *Erasmus: Superior Court Practice*¹² set out the position as follows:

"All the necessary allegations upon which the applicant relies must appear in his founding affidavit, as he will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit. This is, however, not an absolute rule for the court has a discretion, which must be exercised judicially, to allow new matter in a replying affidavit in exceptional circumstances, giving the respondent the opportunity to deal with it in a second set of answering affidavits. In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new

¹¹ SPCA's AA, para 23.1

¹² D E van Loggerenberg, *Superior Court Practice*

matter raised in the replying affidavit were placed before the court;

(ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs. Thus, a distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for relief sought by the applicant. In the latter type of case the court would obviously more readily allow an applicant in his replying affidavit to utilize and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom. The court will, however, not allow the introduction of new matter if the new matter sought to be introduced amounts to an abandonment of the existing claim and the substitution therefor of a fresh and completely different claim based on a different cause of action. Nor will the court permit an applicant to make a case in reply when no case at all was made out in the original application.

...

An applicant is entitled to introduce further corroborating facts by means of a replying affidavit should the contents of the answering affidavit call for such facts."

[57] My view is that this is one of those circumstances where the applicant is allowed to augment his case in reply. His cattle, which were missing, were impounded, initially without his knowledge. The information regarding that impoundment was exclusively within the control of the SAPS and of the SPCA. When these respondents clarified where and when the cattle had been impounded, and

how they were dealt with, he was entitled to raise the point that they were impounded by the SPCA, which was not authorised to do so as the location of the impoundment fell outside of the municipality for which the SPCA was the appointed Poundmaster.

[58] Even I were assume in the respondents' favour that the applicant's cattle were impounded within the municipal boundaries of the Mogalakwena Local Municipality, the evidence put up by the SPCA itself indicates that the agreement which entitled it to act as Poundmaster for the Mogalakwena Local Municipality had expired before the applicant's cattle were impounded and was not renewed until after the cattle had been sold.

[59] It must follow that, if the SPCA was not properly appointed Poundmaster for the Municipality where the cattle were located, it could not lawfully have impounded the cattle, as it had no authority to do so – see *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458; [1998] ZACC 17) at para 58).

[60] As I have already concluded, the impoundment of the applicant's cattle was at the instance of Capt. Ramashala. I cannot fault his contention that the cattle were liable for impoundment – after all, the applicant's brother had not been able to locate them for 48 hours after he first realised they were missing. The applicant complains, correctly in my view, that Capt. Ramashala should have known to contact the right Poundmaster to impound the cattle, and that his summoning of SPCA Mokopane led to the unlawful impoundment of the cattle. I agree: Capt Ramashala is attached to the Provincial Stock Theft unit and should have been aware of who the correct Poundmaster was. His summoning of SPCA Mokopane led to the impoundment of the cattle by a person who had no lawful authority to do so and was unlawful.

[61] The SPCA should equally have been aware of the bounds of its authority, if there was any. In the absence of countervailing evidence, I hold that the SPCA's impoundment of the applicant's cattle was unlawful for want of authority.

The lawfulness of the sale

[62] In his founding papers, the applicant launched a frontal challenge to the

lawfulness of the sale of the impounded cattle, on the basis that it had not complied with the requirements of ss 15(1)(a) and 16 of the Act.

[63] At the stage of launching the proceedings, the applicant could not have done much more than allege that the sale was not compliant with the statutory prerequisites stipulated in the Act for a Poundmaster to lawfully sell the impounded cattle. This information clearly lay under the control of the SPCA, which simply refused to meet the challenge. Its response was that “*all the requirements have been met for a lawful auction of impounded animals*”.¹³

[64] For this quoted contention, the SPCA relies on an advertisement in the *Bosveld Classifieds* of 14 – 20 July 2017 that “*There are 15 stray cattle from Mashashane Village at the SPCA pound that must URGENTLY be claimed by the owners*”.¹⁴

[65] But this is hardly any proof that the SPCA, purportedly acting as Poundmaster and therefore performing a public function, complied with the advertisement and notification requirements of s 16(2). The SPCA, which was purportedly acting as a public functionary, put up no evidence that the sale had been approved by the Municipal Manager or the HoD, as required by the Act. It adduced no evidence to show that notice of the sale had been given to the nearest police station, or that the notice of the sale was posted on the notice board at the pound concerned or at the office of the HoD.

[66] To her credit, the deponent to the SPCA’s answering affidavit indicates that she was only a temporary manager of the Mokopane facility and that the information contained in her affidavit was what appeared in the file.¹⁵

[67] In reply, the applicant correctly pointed out that the SPCA had not put up any evidence that it had advertised the sale of the cattle as required by the Act. The SPCA did not seek leave to file a rejoinder.

¹³ SPCA’s AA, para 24.1.

¹⁴ *Ibid*; Annexure SP2 to the SPCA’s AA.

¹⁵ *Ibid*.

[68] The applicant has not made out any factual basis to support a challenge based on s 15(1)(a), which requires Poundmaster to release any impounded stock if requested by the owner or authorized agent of the owner of such stock against payment in full of all moneys, costs and compensation due, in respect of such stock, in terms of the Act; and if the person claiming ownership of the impounded stock or agent proves ownership of such stock by means of documents and or marks on the said stock to the satisfaction of the Poundmaster.

[69] This is because there is no evidence that the applicant or his brother ever attempted to claim the impounded cattle from the Poundmaster, who the legislation charges with the duty of releasing impounded stock if the requirements of the section are engaged, or to tender payment of the prescribed costs. The requirements are not engaged here because the applicant does not allege any interactions with the Poundmaster; he only alleges interactions with Capt. Ramashala, even during the visit to the pound to view the cattle. This is why I am unable to reject the SPCA's version that neither the applicant or his representative sought to claim the impounded cattle from the Poundmaster. The matter must be decided on this basis.

[70] In my view, the real question is whether the SPCA – acting, as it contends, as Poundmaster – complied with the requirements of the Act for the advertisement and sale of the impounded cattle. To recapitulate again, those requirements are the following:

- a. If the impounded stock has not been released within 21 days of impoundment, the Poundmaster must advertise the sale of the stock by public auction in the prescribed form.
- b. But the Poundmaster may only sell such stock with the approval of the HoD or the Municipal Manager, as the case may be.
- c. The Poundmaster must make an advertisement, at least seven days before such public auction, at the pound

concerned or at the nearest auction site, in the *Gazette* in the official languages used in the Province, and in a newspaper circulating in the area in which the pound concerned is situated, in at least two official languages.

- d. The Poundmaster must furnish the notice of the sale to the nearest police station and to the Poundmaster of every pound within a radius of 30 kilometres from the pound concerned.
- e. The Poundmaster must paste a copy of such notice on the notice board at the pound concerned and at the office of the Head of Department.

[71] The procedures set out in s 16(2) provide an important procedural safeguard for owners of the missing livestock which has been impounded, often without their knowledge.

[72] A person acting as Poundmaster is a public functionary who exercises a public function and is bound by the obligations imposed by s 165(4) of the Constitution to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts, and by s 195 to be accountable and in fostering transparency by providing the public with timely, accessible and accurate information. The SPCA failed in its performance of those obligations, which required it to give the court an accurate account of how it dealt with the impounded cattle.

[73] I am satisfied that the objective evidence and the undisputed facts show that the sale of the impounded cattle, at the instance of the SPCA, was unlawful in that it did not comply with the publication requirements of s 16(2). It follows that a declaration of the unlawfulness of the sale must issue in the applicant's favour for want of compliance by the SPCA with the provisions of s 16(2) of the Act.

[74] But what then? Does a declaration that the sale was unlawful entitle the applicant to the remedies he seeks? I consider this next.

The compensation relief

[75] At the outset, it is necessary to consider the claims against the municipal manager and the MEC, respectively, because of the tenuous links sought to be drawn by the applicant concerning their participation in the events that led to this application.

[76] The applicant claims that the municipal manager (obo the Municipality) should “*be held liable for the damages I have suffered*”¹⁶ as a result of the sale of the impounded cattle because “*the municipal manager should have ensured that all due processes were followed prior to the auction of my livestock*”.¹⁷ The Municipality did not participate in the proceedings, but no case is made against it. The applicant initially sought no relief against the Municipality. It was only upon the objection by the opposing respondents regarding the non-joinder of the Municipality that the applicant did so.

[77] The claim against the MEC is premised on the single allegation in the applicant’s supplementary affidavit that her liability is “*due to [her] failure to ensure that proper advertisements and notices of the sale/auction of my livestock were followed*”.¹⁸

[78] The MEC denies liability on the basis that the Department is not expected to micromanage the functions of municipalities, and that its duty is only one of oversight.¹⁹ She is right. Her deponent asserts positively that her Department was not given notice of the impoundment or intended sale of the impounded cattle, and that it did not grant authorisation of the impounded cattle as required by s 16(1).

[79] The case against the MEC must be decided on her version. In motion proceedings, the affidavits constitute both the pleadings and the evidence. The applicant has not put up any recognised legal ground the MEC is liable to

¹⁶ Applicant’s supplementary affidavit (SA), para 18.

¹⁷ Applicant’s SA, para 15.

¹⁸ Applicant’s **SA**, para 20.

¹⁹ MEC’s AA, para 6.1

compensate him, or any evidence to support such a claim. The applicant's claim against the MEC must be dismissed.

[80] The applicant does not claim that the SPCA auctioned the impounded cattle upon authorisation of the municipal manager or the Head of Department as required by s 16(1). The SPCA also does not assert that it sought or obtained the approval of either the Municipal Manager or the HoD to sell the cattle, except for glibly alleging that all the statutory requirements for the sale were in place. There is no link drawn between the conduct of the Municipality or the Department, on the one hand, and the relief claimed against them. The claims against the Municipality and the MEC must fail.

[81] The compensation relief as against the SAPS respondents and the presents a different conundrum, which is whether the findings above that the impoundment and sale of the applicant's cattle were unlawful in that they did not comply with the requirements of the Act, without more, entitles the applicant to an order that the SAPS respondents and the SPCA are liable to compensate him for the pecuniary loss that he suffered because of the impoundment and sale of the impounded cattle. In my view, the applicant has neither pleaded nor essential elements for the compensation relief.

[82] The pleaded case against the SAPS respondents hinges on the conduct of Capt. Ramashala. I have already held that, while Capt. Ramashala's call for the impoundment of the cattle was unimpeachable, he clearly caused the cattle to be impounded by the SPCA, which had no authority to act as Poundmaster in the municipality where the cattle were located. In doing so, Capt Ramashala fell into error, and the result is that the impoundment of the cattle by the SPCA was unlawful.

[83] The applicant has presented this case on the basis that compensation is the necessary corollary of a finding that the impoundment and sale of the cattle was unlawful. He has not pleaded any recognised ground in law based on which the SAPS respondents and the SPCA are liable to compensate him for the damages that he suffered because of the impoundment and sale of the cattle. This is a necessary precondition for the compensation relief.

[84] As far as I have been able to establish, the applicant would have one of two common law remedies arising from the loss of his cattle (a) a claim based on the *actio rei vindicatio* or (b) the *actio ad exhibendum*, depending on his circumstances. Counsel for the applicant did not suggest there was any other basis.

[85] The *actio rei vindicatio* is clearly not available to the applicant because, and this is common cause, the cattle had already been sold by the time that the applicant instituted these proceedings, and the respondents were therefore in no position to restore the applicant in his ownership of the cattle.

[86] The *actio ad exhibendum* allows a claimant to sue for damages consequent upon the alienation of the claimant's property by another person, in this case the SPCA. To succeed a claim in terms of the *actio ad exhibendum*, the applicant had to allege and prove four essential elements:

- a. First, that he was the owner of the cattle at the time when they were alienated by the SPCA.
- b. Second, that the cattle were in the SPCA's possession as at the time of their sale.
- c. Thirdly, that the counterparty (in this case the SPCA) had knowledge of his ownership of the cattle at the time that he lost possession thereof.
- d. Fourthly, that the counterparty intentionally or negligently disposed of the cattle.

[87] The ultimate question is this: has the applicant, on the papers, made out a case for the *actio ad exhibendum*? If he has, then he is entitled to have brought the proceedings on motion to seek a declaratory order that the respondents make good his loss and that the matter be referred to oral evidence for the determination of the quantum. If he has not, then his claim must be dismissed at this stage, since he has

not sought the referral to oral evidence of those *facta probanda*.

[88] I have already concluded that the applicant was the owner of the impounded cattle, that they were impounded by the SPCA (ostensibly acting as Poundmaster) and that the SPCA sold the cattle before the applicant launched these proceedings. The first two requirements of the *actio ad exhibendum* are met.

[89] But the third and fourth requirements, which are that the SPCA knew that the applicant was the owner of the impounded cattle and intentionally or negligently disposed of them are not met. I have already indicated that the applicant has not contended that he for his brother attempted to claim the cattle from the SPCA, though they were both aware of their whereabouts a few days after the cattle were impounded. This is fatal to a claim under the *actio ad exhibendum*, as it cannot be said that the SPCA was aware of the applicant's ownership of the cattle when it sold them.

[90] It follows that the compensation relief must fail.

Costs

[91] While the applicant failed in the compensation relief, he has been substantially successful in these proceedings against the SAPS respondents and the SPCA. He and should not easily be deprived of his costs. I can think of no other considerations countervailing against an order that the Minister and the SPCA should jointly and severally be responsible for the applicant's costs.

[92] The MEC was only joined at the insistence of the SPCA. The applicant sought to assert his rights to property. The application is not frivolous or vexatious, or in any other way manifestly inappropriate. The general rule in cases like these, that the ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs, must apply. There will be no order as to costs as between the applicant and the MEC.

Conclusion and order

[93] In the result, the following order is made:

1. It is declared that:

- a. The applicant was the owner of 15 head of cattle impounded and removed by the third respondent, at the instance of the second respondent, on or about 13 June 2017 at or near Mapateng village, Ga-Mashashane, to the pound operated by the third respondent at Mokopane (the impounded cattle).
- b. The impoundment of the impounded cattle by the third respondent, at the instance of the second respondent, was unlawful.
- c. The third respondent's sale of the impounded cattle on or about 13 July 2017 was unlawful.

2. The third and fourth respondents shall jointly and severally pay the applicant's costs occasioned by this application, the one paying the other to be absolved, including the costs of counsel on Scale B..

3. Save as aforesaid, the application is dismissed.

TM Kanyane
Acting Judge
Limpopo Division, Polokwane

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