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

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

Application number: 570/2024

In the matter between:

NALA LOCAL MUNICIPALITY

Applicant

and

HANDAX MACHINERY (PTY) LIMITED

1st Respondent

[Reg. No. 2019[...]]

MABOELA FORESTRY AND CONSTRUCTION CC

2nd Respondent

[Reg. No. 2007[...]]

CORAM:

VAN ZYL, J

HEARD ON:

9 February 2024

DELIVERED ON:

26 July 2024

[1] In this application, which served before me on an urgent basis, the applicant is seeking the following relief as set out in the notice of motion:

“1. that this application be heard as one of urgency...

2. that the 1st Respondent is ordered to restore the Applicant's undisturbed possession to the two trucks, to wit: two Powerstar 6M3 Tipper Trucks 2628 6x4 with registration numbers and letters: 0[...]2 and within 2 days of this order being served on the 1st Respondent;
3. directing that should the 1st Respondent fail to comply with the order in paragraph 2 above, after the expiry of the two day period, then the sheriff of the court is hereby authorised to do all that is necessary, including obtaining the assistance of the South African Police Service to give effect to the order in paragraph 2 above;
4. that the 1st Respondent pay the costs of this application on the scale as between attorney and client;
5. that in the event of the 2nd Respondent opposing this application, the Respondents to pay the costs of the application on a scale as between attorney and client, the one to pay the other to be absolved;
6. further and/or alternative relief."

The parties:

[2] The applicant is the Nala Local Municipality and the deponent to the founding affidavit is the Municipal Manager of the applicant.

[3] The respondents are described as follows in the founding affidavit:

- “10. The 1st Respondent is a distributor of Powerstar heavy duty trucks and Powerstar FT Series trucks in Gauteng, South Africa, as well as the sole distributor of Shantui construction and mining equipment and WEICHAH generators in the SADC sub-equatorial Africa region.
11. The 1st Respondent provides professional sales and after-sales service in South Africa and Southern African countries.
12. The 2nd Respondent is Maboela Forestry and Construction CC a close corporation with registration number with registered address situated at 14 Wisani Street, Lotus Gardens, Gauteng Province.
13. The 2nd Respondent is a professional services provider specializing in forestry and vegetation management, building and civil construction and fleet sales and management.”

[4] The first respondent is opposing the application.

The applicant's version:

- [5] According to the applicant the purpose of the application is to restore the status *quo ante* as the applicant has been wrongfully and unlawfully deprived of its possession, access to and use of two Powerstar 6M3 Tipper Trucks 2628 6x4 with registration numbers and letters 0[...]2 and 0[...]7 (“*the trucks*”), whilst being in free and undisturbed possession of the said trucks.
- [6] On or about 4 July 2023 the applicant bought the trucks from the second respondent in the amount of R3 041 750-00. A copy of the

tax invoice and proof of payment made by the applicant to the second respondent for the purchase of the trucks are attached to the founding affidavit as annexures “D1” and “D2”.

- [7] The applicant has since been utilizing the trucks for service delivery in the Bothaville district, and at all relevant times had been in peaceful and undisturbed possession of the aforesaid trucks.
- [8] On or about 14 December 2023 one of the applicant’s employees, Mr Samuel Meiri Seitsiro, a fleet officer, received a call from a certain Mr Tiletso Kumalo informing Mr Seitsiro of two persons who were on their way to take the trucks for a roadworthiness test.
- [9] According to Mr Seitsiro he received a WhatsApp message from one Marc in the employment of the first respondent informing him that the first respondent would like to make arrangements to take the trucks to the test station for roadworthiness tests so that their registration can be finalized. The message indicated that a driver was on the way to “*test and return*”. Copies of the WhatsApp messages are attached to the founding affidavit as annexure “E”. Mr Seitsiro responded that he is in Klerksdorp and not around.
- [10] The agents of the first respondent in fact had already arrived and used spare keys to take the trucks unlawfully from the applicant’s premises situated on the R707 main road, Bothaville, and drove away.
- [11] The trucks were never returned to the applicant.

[12] Upon enquiries the applicant was furnished with a letter received by the applicant's attorney from the first respondent, dated 18 January 2024, claiming that the trucks still belong to the first respondent and that they will only deliver the trucks once they get paid. They further stated that they are still in possession of the spare keys.

[13] From a letter of the applicant's attorney to the second respondent, dated 19 January 2024, it appears that the second respondent had been paid in full for the trucks, but that the second respondent did not pay the money over to the first respondent.

[14] A letter of demand was written by the applicant's attorney of record to the first respondent, dated 23 January 2024, in which it was stated that the applicant was in undisturbed possession of the trucks since July 2023 up to the date when the first respondent's employees repossessed and removed the trucks without consent. The urgent return of the trucks was consequently demanded to take place by Thursday, 25 January 2024, failing which legal action will be taken.

[15] The trucks were not returned to the applicant.

Urgency:

[16] According to the applicant it is responsible for service delivery within its area of jurisdiction, which includes water, sanitation, road maintenance, waste and refuse removal and electricity provision and maintenance.

[17] A spoliation application is urgent in nature. In this instance the urgency is not self-created but justified in the circumstances as the applicant cannot utilize the trucks for service delivery and to serve the Bothaville community at large.

[18] The spoliation occurred on 14 December 2024 just prior to the festive season commencing. All businesses were consequently closed during builders' holiday between 6 December 2023 and 4 January 2024. The Municipal Manager was consequently only informed of the spoliation on 18 January 2024.

[19] Subsequent thereto the applicant's attorney of record addressed its first letter to the respective respondents on 19 and 23 January 2024 respectively. A consultation with counsel was scheduled on 24 January 2024, whereafter the application was drafted the next day on 25 January 2024 and settled on 26 January 2024 when the additional documentation requested from counsel came to hand.

The first respondent's version:

[20] Mr Marc Mynhardt, the sales manager deposed to the affidavit on behalf of the first respondent.

Urgency:

[21] According to the first respondent he informed the representative of the applicant that the first respondent is holding on to the trucks until same have been paid as far back as 18 December 2023. Had the matter been urgent for the applicant, it is inconceivable that the

deponent to the founding affidavit was only informed of the alleged spoliation on 18 January 2024.

[22] In the replying affidavit the applicant explained that he only returned from holiday mid-January 2024 and that it was then that he was informed that the trucks had still not been returned to the applicant. As accounting officer of the applicant he is the only person who has the authority to resolve the issue. Therefore, as soon as it came to his attention, he immediately consulted with the applicant's legal team whereafter the correspondence followed and eventually the application when it became apparent that no agreement would be reached.

Authority:

[23] At paragraph 1 of the founding affidavit the applicant stated as follows:

"I am an adult male and the Municipal Manager of the Applicant. I am duly authorized *ex lege* to launch this application and to depose to this affidavit on behalf of the Applicant. I furthermore attach hereto a signed delegation of authority marked as Annexure "A" confirming my authority as aforesaid."

[24] However, the delegation of authority does not reflect the delegations as such, but only reflects a summary and page references thereto and not the contents itself.

[25] In response to the aforesaid, the first respondent indicated that it has no knowledge of the said allegations, does not admit same and puts the applicant to the proof thereof.

[26] In the applicant's response to the aforesaid denial of authority, the applicant attached a very illegible letter to its replying affidavit which he states is a "*signed delegation of authority*". From the minimal words I can make out from the said document, it appears to be an appointment letter of the Municipal Manager. Be that as it may, I will return to this aspect.

Kena Media/documents

Merits:

[27] In its answering affidavit the first respondent refers to and relies on the registration certificate in respect of the trucks attached to the founding affidavit as annexures "A" and "B" respectively. In this regard it is the first respondent's case that it is evident that the title holder and owner of the trucks is the first respondent. The first respondent furthermore relies on the tax invoices issued during July 2023 when the first respondent sold the trucks to the second respondent where one of the conditions of sale is reflected that "*it is an express condition of this sale that ownership in the goods hereby sold shall remain vested in seller until such time and the full purchase price of the said goods has been paid to the seller*".

[28] With regard to the contact between Mr Mynhardt of the first respondent and Mr Seitsiro of the applicant, it is alleged on behalf of

the first respondent that during the telephonic conversations between the two parties the logistics were arranged for the first respondent to collect the trucks. According to the first respondent the trucks were taken from the applicant with the knowledge and consent of its representative.

[29] The first respondent furthermore relies on the WhatsApp Mr Mynhardt sent to Mr Seitsiro on 18 December 2023 wherein he stated “*Trucks done with. Test just holding them until we are paid, to date we received no payment for the trucks....as soon as payment is received we deliver back to you immediately*”. Mr Seitsiro responded at 16h19 on the same day by stating “*Marc tell me how much we are talking about?*”. The next morning at 09h45 Mr Seitsiro again enquired from Mr Mynhardt by means of WhatsApp “*Morning sir, can you please be so kind to tell me how much is outstanding*”.

[30] With regard to the events at the stage when the trucks were removed, the first respondent stated as follows at paragraph 36 of its answering affidavit:

“36.1 One of the first respondent’s drivers, Alson Ndove and I were at the Applicant’s premises...

36.2 Only one truck was at the premises. A representative of the Applicant gave the original truck key to Ndove in my presence. Ndove used the original key to drive the truck to the first respondent’s premises.

36.3 I waited with Mr Seitsiro for the second truck to arrive. When it arrived, the Applicant's driver gave me the original key to the truck. I waited for the First Respondent's second driver to arrive and when he arrived, he drove the truck to the First Respondent's premises with the original key".

[31] The first respondent subsequently avers that in as much as the first respondent removed the trucks, which are the lawful property of the first respondent, the said removal was done with the knowledge and consent of the duly authorised representative of the applicant. According to the first respondent there is consequently no obligation on it to return the trucks to the applicant.

[32] According to the first respondent it was not only in possession of the spare keys of the trucks, but were also in possession of all three sets of keys for the trucks after having been furnished with the keys to the trucks by the duly authorised representative of the applicant.

[33] The first respondent also dealt in its answering affidavit with the relevant correspondence between the parties' attorneys and the first respondent emphasized the fact that the applicant did not deny that it furnished the first respondent with the keys to the trucks.

[34] With regard to the allegation in the founding affidavit that the true intention of the first respondent was never to return the trucks to the applicant and that a misrepresentation was used to take possession thereof, the first respondent states that it made no misrepresentation. It was the intention of the first respondent to return the trucks once it has been paid.

[35] Towards the end of the answering affidavit the first respondent states as follows at paragraph 52:

“On 14 December 2024, (*sic*) the First Respondent lawfully, with the knowledge and consent of the duly authorised representatives of the Applicant removed the trucks from the Applicant’s possession to have the trucks go through roadworthy, then once paid, have them licenced to the Applicant. I deny that the removal constitutes an act of spoliation and the Applicant is put to the proof thereof”.

CONDISDERATION OF URGENCY:

[36] Rule 6(12) determines as follows:

“6(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

(b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is [*sic*] averred render [*sic*] the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.”

[37] Arising from and connected to the aforesaid principle, is the consequent obligation on an applicant in an urgent application to explain all periods of delay for purposes of making out its case for urgency. The relevant principle applicable to condonation applications in this regard is consequently *mutatis mutandis*

applicable to an urgent application. In **High Tech Transformers (Pty) Ltd v Lombard** (2012) 33 ILJ 919 (LC) the importance of a reasonable and acceptable explanation for a delay was accentuated at para [25] of the judgment:

“[25] ... Condonation is not merely for the asking as was duly pointed out by the court in *NUMSA & another v Hillside Aluminium* [2005] 6 BLLR 601 (LC):

‘[12] Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. ... Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process.’”

[38] In the present matter there was a delay of approximately a month between the spoliation and the action taken by the applicant. However, considering the explanation advanced by the applicant for the said delay, I am of the view that it constitutes a reasonable explanation in the circumstances.

[39] In addition it is acceptable and understandable that the applicant is in urgent need of the use of the trucks for purposes of service delivery to the community, which is its Constitutional duty.

[40] I am consequently of the view that condonation should be granted.

CONSIDERATION OF AUTHORITY:

[41] I have already dealt with the relevant factual allegations and the denial thereof in respect of the authority of the deponent to the founding affidavit.

[42] The deponent's authority to have deposed to the affidavit on behalf of applicant, is neither here nor there. No such authority is necessary. In **Ganes and Another v Telecom Namibia Limited** 2004 (3) SA 615 (SCA) [**Ganes**] at para [19] the Supreme Court of Appeal determined as follows:

“.... In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.”

[43] Insofar as the first respondent attempted to challenge the authority of the deponent to the founding affidavit to have launched/instituted the application on behalf of the applicant, the Court found in **Ganes**, *supra*, at para [19] as follows:

“... In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705 C – J.)”

[44] In **Unlawful Occupiers, School Site v City of Johannesburg** 2005 (4) SA 199 (SCA) the authority of the person who deposed to the affidavit on behalf of the respondent (the applicant in the court *a quo*) was challenged. In the said matter the appellant directed its attack against a resolution of the municipal council which authorised the deponent to have launched proceedings of the kind in that matter. The Court determined as follows at para [14]:

“At the hearing of the appeal, council for the appellants conceded that she could not support this kind of appeal. I think the concession was fairly made. The issue raised had been decided conclusively in the judgment of Flemming DJP in *Eskom v Soweto City Council* 1992 (2) SA 703 (W), which was referred to with approval by this Court in *Ganes and Another v Telecom Namibia Limited* 2004 (3) SA 615 (SCA) at 624 I – 625 A. The import of the judgment in Eskom is that the remedy of a respondent who wishes to challenge authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court. ...” (Own emphasis)

[45] The Court further stated as follows at paragraph [16] of the said judgment:

“However, as Flemming DJP has said, now that the new Rule 7(1) remedy is available, the party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, i.e. by way of argument based on no more than a textural analysis of the words used by a deponent in an attempt to prove his or her authority. This method invariably resulted in the costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent’s challenge resulted in

the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. ...”

[46] The judgment in the matter of **ANC Umvoti Council Caucus and Others v Umvoti Municipality** 2010 (3) SA 31 (KZP) dealt with all three the aforesaid judgments and determined as follows at paras [14] and [27] to [29]:

“[14] The question is, rather, whether an applicant is obliged to prove, on the papers, that authority has been given to initiate litigation where the applicant is an artificial person. ...

[27] ... Whether or not the litigation has been properly authorised by the artificial person named as the litigant would not be dealt with by means of evidence led in the application. If clarity is required, it should be obtained by means of Rule 7(1) since this is a procedure which safeguards the interests of both parties.

[28] ... It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used. This means that I disagree with Mr Gajoo’s submission that Rule 7(1) provides only one possible procedure and that, if the respondents elects to challenge the matter of authority on the application papers, the applicant is required to prove such authority on the papers.

[29] There was no challenge in terms of Rule 7(1) in the application which is the subject of this appeal. The appropriate procedure was therefore not used by the appellants. It was accordingly not necessary for the applicant to prove the authority to initiate the application, nor appropriate to attempt to do so on the papers. It was also not necessary for the court a quo to make a finding relating to authority on

affidavits delivered in the matter. Since there was no challenge in the required manner to the authority of the respondent's attorney who signed the notice of motion and initiated the application in the accepted way, this court does not have to deal with the question of authority. I am therefore of the view that the appeal on this issue must fail."

[47] In the present matter there was no challenge of the deponent's authority by means of Rule 7(1) and I therefore do not have to deal with the question of authority.

CONSIDERATION OF THE MERITS:

[48] It is trite that in order to obtain a spoliation order two allegations must be made and proved:

- “(a) that the applicant was in possession of the property; and
- (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.”

See **Erasmus Superior Court Practice**, D.E van Loggerenberg, at p. D7-6.

[49] Against the background of the relevant facts and circumstances of this matter, it cannot be disputed that the applicant was in the *de facto* possession of the trucks at the time when the employees of the first respondent removed the trucks.

[50] In **Erasmus Superior Court Practice**, *supra*, at p. D7-2 to D7-3 the following principles are stated with reference to applicable authority:

“The reason behind the practice of granting spoliation orders is that no man is allowed to take the law into his own hands, and to dispossess another illicitly of possession of property. This applies equally whether the despoiler is an individual or a government entity or functionary. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute. The rule is *spoliatus ante omnia restituendus est*. A court hearing a spoliation application does not concern itself with the rights of the parties (whatever they may have been) before the spoliation took place; it merely inquires whether or not there has been a spoliation, and if there has been, it restores the *status quo ante*. In spoliation proceedings the court will, therefore, neither enter into the lawfulness of the applicant’s possession, nor into the question of ownership.” (My emphasis)

[51] With regard to the “possession” requirement, the following is stated in **Erasmus Superior Court Practice**, *supra*, at p. D7-7:

“The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. In spoliation proceedings the court is not concerned with the lawfulness of the applicant’s possession. In other words, the applicant must show not that he was entitled to be in possession, but that he was in *de facto* possession at the time of being despoiled.” (My emphasis)

[52] From the aforesaid paragraph and also from further allegations in the correspondence and the answering affidavit, it is evident that the first respondent is firstly relying on its alleged ownership of the trucks in opposition to the spoliation application. However, it is clear from the applicable legal principles that ownership is not relevant for purposes of spoliation.

[53] In addition the contractual terms which the first respondent is relying on relates to an apparent contract between the first respondent and the second respondent and not between the first respondent and the applicant. The said contractual issues between the first respondent and the second respondent, therefore, do also not exclude the applicability of the spoliation.

[54] For the requisite that the applicant has to prove that it has been deprived of possession, the following principles are summarised in **Erasmus Superior Court Practice**, *supra*, at p. D7-12A – D7-13:

“Deprivation of possession does not entail that the possession of the property despoiled must have passed over to the respondent. Spoliation takes place if the applicant is deprived by the actions of the respondent of control over the property in question.

... Since the decision in *Nino Bonino v De Lange* it is generally accepted that any wrongful deprivation — including by force or by stealth — suffices.

Wrongful deprivation in this context means deprivation against the will of the person and without resort to the legal process. Thus, a spoliation order will be granted if the applicant has been deprived of possession by a trick or secretly, without his knowledge or consent;...”

[55] The first respondent avers that the trucks were removed with the permission of the employees of the applicant. However, in my view it is evident that the employees of the first respondent misrepresented the true facts to the applicant’s employees by presenting a scenario that the trucks were just going to be taken for

roadworthy tests and will then be returned. The permission that was given was therefore limited and restricted to a roadworthy tests and not to deprive the applicant of its free and undisturbed possession of the trucks indefinitely. The WhatsApp from Mr Marc Mynhardt of the first respondent specifically stated “*can take test and return*”. In these circumstances the issue of which keys were used is in my view irrelevant.

[56] What is insightful is that at paragraphs 36.2 and 36.3 of the answering affidavit, where the first respondent dealt with the respective keys, it was stated specifically stated that the relevant keys were used to drive the trucks “*to the first respondent’s premises*”. This is directly contradictory to the presentation which was made to the applicant’s employees. In fact, in the totality of the first respondent’s papers there is not a single indication that the trucks were taken for roadworthy tests on that day at all.

[57] The applicant’s employees were therefore tricked into allowing the first respondent’s employees to remove the trucks. The first respondent’s conduct therefore constituted unlawful deprivation of the applicant’s free and undisturbed possession of the trucks and therefore despoiled the applicant.

[58] The applicant is consequently entitled to the relief it is seeking.

Costs:

[59] There is no reason why costs should not follow the outcome. The applicant was seeking attorney and client costs in its notice of

motion, but Mr Van Amstel, on behalf of the applicant, indicated during argument that the applicant no longer persist with seeking as punitive costs order.

Order:

[60] The following order is made:

1. The application is heard as one of urgency in terms of rule 6(12) and condonation is granted in respect of forms and time periods.
2. The first respondent is ordered to forthwith restore the applicant's free and undisturbed possession of the two trucks, to wit: two Powerstar 6M3 Tipper Trucks 2628 6x4 with vehicle identification numbers (VIN) L[...]2 and L[...]7, respectively, and within 2 days of this order being served on the first respondent.
3. Should the first respondent fail to comply with the order in paragraph 2 above, after the expiry of the two-day period, then the sheriff of the court is hereby authorised to do all that is necessary, including obtaining the assistance of the South African Police Service, to give effect to the order in paragraph 2 above.
4. The first respondent is to pay the costs of this application.

C. VAN ZYL, J

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