

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 10895/2024P

In the matter between:

TRANSASIA 1 (PTY) LTD

APPLICANT

AND

THE SHERIF OF THE HIGH COURT, DUNDEE

FIRST RESPONDENT

CATERPILLAR FINANCIAL SERVICES

SOUTH AFRICA (PTY) LTD

SECOND RESPONDENT

MAHLANGUMGABADENI TRADING ENTERPRISE CC

THIRD RESPONDENT

PHEZUKOMKHONO COMMUNITY

PROPERTY ASSOCIATION

FOURTH RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Applicant brought an urgent application seeking the return of a Caterpillar Large Excavator 395 with serial number S[...] from First Respondent (the Sheriff of the High Court Dundee) and Second Respondent. Further that the costs be paid by First and Second Respondent jointly and severally. The application was opposed by First and Second Respondent.

[2] It is common cause that in an application brought by Second Respondent herein on 12 September 2023 an order was granted by Langa J in the Mpumalanga Division Middleburg (Local Seat) that the said Caterpillar Excavator amongst others be delivered to the Sheriff by Respondent therein which is Mahlangumgabadeni Trading Enterprise CC (Third Respondent herein). Paragraph 2 of the order reads as follows:

“In the event of the Respondent failing to comply with 1 above, the Sheriff of the High Court is authorised and ordered to take possession of the units from wherever he/she may find them, and the Sheriff is authorised to retain possession of the units until delivered to the Applicant or its fully authorised representative.”

What further was not disclosed by Applicant in its founding papers (but not disputed) was that there is an application to be heard in the Mpumalanga Division on 2 September 2024 to have the said order of Langa J. rescinded.

[3] It is common cause that the said Caterpillar Excavator was on 25 June 2024 found on the premises of Applicant. It is set out in the founding papers how Applicant came to be in possession thereof. Second Respondent contends that Applicant has provided different reasons as to how it came to be in possession of the Caterpillar Excavator and has not proved on a balance of probabilities that it was in possession thereof. In my view for the reasons set out in this judgment it is not necessary to make a finding in this regard and it is accepted that Applicant was in possession of the Caterpillar Excavator.

[4] It is further common cause that Applicant refused to grant the Sheriff (First Respondent) permission to enter its business premises where it wished to attach and remove the said Caterpillar Excavator in terms of the court order. First Respondent thereafter obtained the assistance of a lock smith and armed guards and requested the South African Police Services to be present. The Caterpillar Excavator was then removed from Applicant's premises. Applicant contends that the locks and chains were

cut, that the gate was removed and that First Respondent then gained entry and removed the said Caterpillar Excavator from the premises which was about 5 km from the main gate. Applicant contends that First Respondent caused damage to the property of Fourth Respondent. Fourth Respondent did not oppose the application.

[5] It was submitted on behalf of Applicant that the matter was urgent. On 25 June 2024 Applicant requested an attorney for assistance. A letter was addressed to Second Respondent on 27 June 2024 stating that the removal of the Caterpillar Excavator by First Respondent was unlawful. On 28 June 2024 Second Respondent replied that the court order was properly executed and Applicant thereafter instructed its attorney to brief counsel. It was recess and it found it difficult to obtain counsel and a letter of demand was sent for payment by the Sheriff of R13 000 000.00 in respect of damages caused to Fourth Respondent's property. Junior counsel was first briefed and commenced drafting papers and then on 13 July 2024 Mr. Sibuyi advised that senior counsel be instructed who then drafted the papers *de novo*. Applicant was not dilatory to finalise the papers and that spoliation proceedings are inherently urgent and accordingly that the matter is to be heard on an urgent basis.

[6] It was submitted on behalf of First Respondent that in compliance with the court order from the Mpumalanga Division it on 25 June 2024 obtained the services of a lock smith and the police to remove the Caterpillar Excavator after he was refused entry by Applicant's employees. It was indeed one of the excavators described in the court order. This is not disputed. It was submitted that there were no grounds of urgency. Applicant was aware of the attachment on 25 June 2024 but only issued its papers on Friday 12 July 2024 which was sent to First Respondent on 15 July 2024 who was then expected within a very short time to respond to the application. It was therefore submitted that the application ought to be dismissed. It was further submitted that First Respondent was entitled in terms of the Sheriff's Act and Uniform Rules of Court to obtain the services of a lock smith and the police when Applicant refused it access to the said premises.

[7] It was submitted on behalf of Second Respondent that Applicant dragged its feet, that the attachment was on 25 June 2024, that it wrote a letter on 27 June 2024 and that it was responded to on 28 June 2024 that the court order was complied with. It was three weeks later that Applicant brought an application and only gave Respondents two days notice to file an answering affidavit. The reasons that were provided for urgency were entirely self-created and that the application was therefore not urgent. It was also submitted that Applicant did not make out a case for the final relief it sought and that the Caterpillar Excavator was correctly attached and removed in terms of the court order.

[8] Applicant accepts the court order is valid but submits it's application is based on the contention that First Respondent exceeded the bounds of its authority as the court order of Mpumalanga did not make provision for the Sheriff to obtain the services of the police and a lock smith and that the order had to be properly interpreted in such a way that it would render it constitutional. First Respondent was authorised to take possession of the units wherever he/she may find them but the steps taken were not prescribed. As this was not in the order it is a vital issue and the conduct of First Respondent was unlawful. It breached Applicant's right to privacy. When they took the law into their own hands First and Second Respondent deprived Applicant of its right to have a court determine the dispute that has arisen. That is the issue which must now be determined. It is in my view firstly necessary to determine whether the application was indeed urgent and only once it is found that it is urgent the merits as to the interpretation of the court order of the Mpumalanga High Court would arise.

[9] I was referred to the decision in Volvo Financial Services Southern Africa Pty. (Ltd.) v Adamas Tkolose Trading CC 2023 (JDR) 28806 (GJ) paragraph 6 where Wilson J stated that the concept that a vindicatory application is inherently urgent should be avoided and there is no class of proceeding that enjoys inherent preference. It held that the urgency is determined not by the nature of the claim but by the circumstances in which the applicant seeks its adjudication. It held in respect of a spoliation that they could be urgent provided that the persons spoliated acts promptly. It was submitted a spoliation application should be instituted within a reasonable time and that Applicant's

explanation in bringing the application on an urgent basis after the time delay has not been sufficiently explained and that the reasons given for the delay do not justify that it be heard on an urgent basis.

[10] In the Law of Property by Silberburg and Schoeman 6th Edition it sets out the following at page 326 paragraph 13.2.1.1:

“The purpose of a *mandament van spolie* is to restore unlawfully deprived possession at once (*ante amnia*) to the possessor, in order to prevent people from taking the law into their own hands, to foster respect for the rule of law and to encourage the establishment and maintenance of a regulated society.”

Applicant must prove that he was in possession and that the spoliation was committed by Respondents. This has to be proved on a balance of probabilities.

[11] In the same publication at page 335 it states:

“Unlawfulness for the purpose of a *mandament van spolie* means whenever a person on account of alleged or supposed rights, deprives another of possession against his or her will and without recourse to the legal process so that it can be said that such a person acted as his or her own judge by taking the law into his or her own hands.”

[12] As already set out above in the present matter the taking of the Caterpillar Excavator was in terms of the court order. It was not by any Respondent taking the law into his or her own hands. It was submitted on behalf of Applicant that First Respondent did not comply with the court order as First Respondent took steps which were not allowed in terms of the court order as the order was silent on vital issues and that the action was not lawful. It was submitted that Applicant was entitled to refuse First Respondent access to the premises to remove the Caterpillar Excavator and that First Respondent had no power to enter the premises forcibly. Accordingly it was submitted

that there was no justification for such conduct, that Applicant's privacy was infringed and that First Respondent took the law into its own hands.

[13] Firstly on the issue of urgency it would appear to me that Applicant was indeed dilatory in its conduct by taking nearly one month to bring the said application. However more lenience is allowed in such cases due to the fact that spoliation is a serious matter and that there are cases where it can be brought after some time. Accordingly in these circumstances I accepted there was some urgency and to hear the matter on the basis of urgency.

[14] The issue then still remains whether the relief which is sought is to be granted. The matter was addressed by all the parties. As set out above this is not an ordinary *mandament van spolie* application in that the Caterpillar Excavator was not taken by any party acting on their own accord but in terms of a court order. The basis for Applicant's application is that First Respondent exceeded the bounds within which it was entitled to obtain possession of the said Caterpillar Excavator in terms of the court order.

[15] First Respondent, in terms of the court order, had to take possession of the units wherever they may have been found and to retain possession thereof. First Respondent should have been given access to the premises by Applicant's employees. First Respondent was exercising its rights in terms of the court order to take possession of the Caterpillar Excavator where ever it may be found. It is common cause that it was found on the premises of Applicant. First Respondent, when being refused access, was entitled to obtain the services of a lock smith to gain entry into the premises. The assistance of the police was not sought to assist First Respondent but was merely, from the papers, to be observers to watch what was being done. If First Respondent was refused access and first had to bring an application in the High Court for permission to obtain the services of a lock smith as was submitted on behalf of Applicant it could possibly lead to the Caterpillar Excavator having been removed from the premises before the order could be obtained. In my view First Respondent was entitled to act as

he did. There was a court order and that it is implied therein that the Sheriff could do what was necessary to obtain entry to the premises and comply with the court order. Although Rule 45 of the High Court Rules does not specifically state so, Rule 46 relating to when a Sheriff has to gain access to an immovable property specifically states that the services of a lock smith can be obtained. First Respondent was obliged to execute the order. First Respondent had to attach and remove the Caterpillar Excavator wherever it was found. That is what was done.

[16] Court orders are binding until set aside and to ensure that the legal system remains operational these orders must be enforced until set aside. There are limits to freedom and when there is a court order which the Sheriff must comply with it must be granted the necessary access.

[17] In my view First Respondent acted in terms of a valid court order which is still valid. Applicant failed to disclose that an application to rescind the order was set down in the Mpumalanga High Court on 2 September 2024. It is therefore not the position that Applicant has no alternative remedy. There is a court order which is still valid and the application on 2 September 2024 which could then rule whether the said order is to be rescinded or not.

[18] In my view Applicant has, on the papers for the reasons set out above, failed to prove on a balance of probabilities that the conduct of First Respondent was unlawful.

I accordingly make the following order:

The application is dismissed with costs. Such costs to be on scale B and only for one set of correspondent attorneys.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED:

19 JULY 2024

JUDGMENT HANDED DOWN:

26 JULY 2024

COUNSEL FOR APPLICANT:

MR. B C STOOP SC

Instructed by:

TTS Attorneys Inc

Johannesburg

Ref: Mr T Sibuyi

Tel: 078 213 4745

Email: t.sibuyi@attsattorneys.co.za

c/o: Viv Greene Attorneys

Pietermaritzburg

COUNSEL FOR FIRST RESPONDENT:

MR. R MANIKLALL

Instructed by:

Ravindra Maniklall & Company Inc

Umhlanga Ridge

Ref: Mr Maniklall

Tel: 032 5337488

Email: rmcattorneys@gmail.com

COUNSEL FOR SECOND RESPONDENT:

MR P G LOUW

Instructed by:

Werksmans Attorneys

Sandton

Ref: Ms E De Doncker/Ms Z Oosthuizen/ CATE41156.120

Tel: 011 535 8176

Email: zoosthuizen@werksmans.com

c/o: Garlicke & Bousfield Inc

Durban

c/o: Botha and Olivier Attorneys

Pietermaritzburg

Tel: 033 342 7190

Email: LEGAL@BANDO.CO.ZA