



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Not reportable
CASE NO. 154/2024

In the matter between:

ANTHONIE CHRISTOPHER LOMBARD

Applicant

and

FORT HARE UNIVERSITY

First respondent

MINISTER OF POLICE

Second respondent

JUDGMENT

LAING J

[1] This is an application for a spoliation order regarding 13 head of cattle presently being kept at the first respondent's research farm, situated on the outskirts of the town of Alice. If the spoliation order is granted, then the first respondent seeks, in turn, an order interdicting the applicant from disposing of the cattle pending the conclusion of a criminal investigation and any proceedings resulting therefrom.

Background

[2] The applicant is a cattle trader. On 1 November 2022, he paid R 196,374 for the purchase of cattle from the first respondent ('UFH'), purportedly represented by Mr Dirk Potgieter. UFH subsequently delivered 36 head of cattle to Stanford Park farm, which the applicant uses for grazing. Mr Potgieter provided the applicant with removal certificates. The applicant left in place UFH's ear tags for the cattle so that they could be identified for weighing and selling purposes. A year later, on 27 October 2023, an employee of UFH, Mr Brian Mthembu, arrived at Stanford Park under the pretence of buying cattle; he departed and returned in the company of employees of the second respondent ('SAPS')¹ to remove the 13 head of cattle that form the subject of the application. This was done without a warrant or any other form of authority. The cattle are being kept at UFH's research farm, Honeydale. Attempts made by the applicant or his attorneys to secure the return of the cattle from the respondents have proved fruitless.

[3] UFH explained that the intended sale of any of its cattle first requires approval from an Animal Ethics Committee as well as a sub-structure of the Farm Committee. The latter will finally approve the sale once satisfied that the cattle are not required for research purposes. UFH's farm manager must then notify the relevant auctioneers or livestock agents, upon which the cattle are sold by public auction. It was not normal for cattle to be sold under a private transaction or without prior approval.

[4] Acting upon a suspicion that the farm manager, Mr Potgieter, was involved in the unlawful sale of cattle, UFH instituted an investigation which resulted in his suspension. On 27 October 2023, the acting farm manager, Mr Mthembu, learnt that cattle at Stanford Park and bearing UFH's ear tags were being sold to the public. This led to his visit to the farm, accompanied by a Warrant Officer Simphiwe Zono, culminating in the confiscation of the cattle. UFH alleged that, from its investigations, it appeared that Mr Potgieter had been selling cattle without the necessary approval; this had also been

¹ The abbreviation refers to the South African Police Services.

done in contravention of UFH's policies, and at below market-related prices. Neither the Farm Committee nor the Animal Ethics Committee had approved the sale of any cattle to the applicant. This prompted UFH to lay a charge of stock theft. The SAPS investigation is ongoing.

[5] For its part, SAPS confirmed that the cattle were removed from Stanford Park as part of its investigation. To that effect, W/O Zono indicated that he had held a reasonable suspicion at the time that the cattle had been stolen from UFH and that the cattle would not remain on the farm if he waited to obtain a warrant or other form of authority. He stated that arrests were imminent.

[6] In a lengthy reply, the applicant asserted that his prior dealings with UFH had always been via Mr Potgieter, who had been vested, ostensibly, with the necessary authority. The purchase price that he paid for the cattle in question was R 24.50 per kilogramme for a weaner and R 18.00 per kilogramme for a calf; these were market-related prices. Mr Mthembu had been present at the time of the transaction and had recorded the mass of the cattle. The applicant conceded that the university generally sold cattle by way of public auction but was adamant that it also engaged in private sales, wherein it was represented by Mr Potgieter.

Issues to be decided

[7] The main issue for determination is whether the applicant is entitled to a spoliation order. This will depend, chiefly, on whether he was unlawfully deprived of possession of the cattle. If the court refuses to grant the order, then that will be the end of the matter; conversely, if the court grants the order, then it must determine whether UFH is entitled to an interlocutory interdict.

[8] A brief overview of the relevant principles follows.

Legal framework

[9] The nature of a spoliation order was described by the Supreme Court of Appeal in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*,² where Cameron JA remarked as follows:

‘The remedy originated in the canon law, and found its way thence into Roman-Dutch law and modern South African law. Under it, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante omnia restituendus est*). Even an unlawful possessor- a fraud, a thief or a robber- is entitled to the *mandament*’s protection. The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property.’³

[10] Several years later, the Constitutional Court dealt with the subject in *Ngqukumba v Minister of Safety and Security and Others*.⁴ The matter involved the confiscation by the police, without a search-and-seizure warrant, of a motor vehicle of which the chassis and engine numbers had been tampered with. The court confirmed that a spoliation order was intended to prevent the taking of possession otherwise than in accordance with the law, the underlying philosophy being that no-one should resort to self-help to obtain or regain possession. The remedy applied equally, irrespective of whether the despoiler was an individual or a government entity or functionary.⁵ The court went on to hold, per Madlanga J, that:

‘It matters not that a government entity may be purporting to act under colour of a law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law. Surely then it should make no difference that in dispossessing an individual of an object unlawfully, the police purported to act under colour of

² 2007 (6) SA 511 (SCA).

³ At paragraph [21].

⁴ 2014 (5) SA 112 (CC).

⁵ At paragraphs [10] and [11].

the search and seizure powers contained in the Criminal Procedure Act. Non-compliance with the provisions of the Criminal Procedure Act in seizing a person's goods is unlawful. This unlawfulness, plus the other requirements for a spoliation order (namely, having been in possession immediately prior to being despoiled), satisfies the requisites for the order. All that the despoiled person need prove is that–

(a) she was in possession of the object; and

(b) she was deprived of possession unlawfully.

...The obvious conclusion is that the *mandament van spolie* is available even against the police where they have seized goods unlawfully.⁶

[11] The case law makes it clear that a spoliation order is indeed available to an unlawful possessor. Illegal dispossession must first be addressed before a court can decide questions of ownership or merely continued possession of the item in question.

[12] Turning to UFH's counter-application, the prerequisites for an interlocutory interdict are well-known and hardly need to be restated. An applicant must prove a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, a balance of convenience in favour of the granting of the interim relief, and the absence of any other satisfactory remedy.⁷

[13] The above principles comprise the basic legal framework within which the present matter must be determined. They are applied to the facts of the case in the paragraphs below.

Spoliation order

⁶ At paragraphs [13] and [14].

⁷ *Setlogelo v Setlogelo* 1914 AD 221. See, too, the discussion in DE van Loggerenberg, *Erasmus: Superior Court Practice* (Juta, vol 2, 2ed, service 21, 2023), at D6-1-26.

[14] The key aspect to be decided is whether the applicant was unlawfully deprived of possession of the 13 head of cattle described in the papers. The parties referred to the relevant provisions of the Criminal Procedure Act 51 of 1977 ('CPA'). Section 20 thereof permits the state to seize anything which, *inter alia*, is concerned in or is, on reasonable grounds, believed to be concerned in the commission or suspected commission of an offence. Section 21 stipulates that an item shall only be seized by virtue of a search warrant, subject to certain exceptions. Section 22 is especially relevant and provides that:

'A police official may without a search warrant search any person or container or premises for the purposes of seizing any article referred to in section 20–

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(b) if he on reasonable grounds believes–

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search.'

[15] From the papers, it cannot be disputed that SAPS, not UFH, dispossessed the applicant of the cattle. Mr Mthembu merely accompanied W/O Zono to Stanford Park; the cattle were loaded onto a UFH truck at the instruction of SAPS and taken to the Adelaide police station, whereafter they were delivered to Honeydale for safekeeping, pending further police investigation.

[16] In dealing with the requirements indicated under section 22(b), UFH referred to the decision in *Nielson t/a Playtime Internet Café v Minister of Police and Another*,⁸ where Mahalelo J observed that:

‘It should be borne in mind that the question is not whether the applicant’s alleged business operation was lawful or unlawful in order to claim the relief under spoliation, it is whether the respondent at the time of execution of the search and seizure did indeed have the reasonable belief, based on suspicion, facts and evidence that a search warrant will be issued under the circumstances if such facts are presented to a magistrate when applying for a search warrant prior to a search and seizure and that the delay in obtaining such an order will defeat the object of the search.’⁹

[17] The case law emphasises, however, that there must be reasonable grounds for such a belief. It cannot be said that a reasonable belief exists merely because a police official is of the view that he or she has such a belief at the time.¹⁰

[18] W/O Zono explained the basis for his belief in SAPS’s answering affidavit. The cattle were removed for several reasons, *inter alia*: UFH had laid a charge of stock theft; Mr Mthembu had requested W/O Zono to accompany him to a farm where it was believed that cattle belonging to UFH were being kept; the cattle in question bore UFH ear tags; the farm owner had informed W/O Zono that the applicant owned the cattle and had already sold more than half of the herd; it was widely known that the applicant sold cattle from Stanford Park to the public; and if W/O Zono waited until after the weekend to obtain a search warrant, then the cattle would not remain on the farm.

⁸ (12880/19) [2019] ZAGPJHC 269 (6 May 2019).

⁹ At paragraph [29].

¹⁰ *Ndabeni v Minister of Law and Order and Another* 1984 (3) 500 (D), at 511, where Didcott J cited with approval the decision of Milne J in *Watson v Commissioner of Customs and Excise* 1960 (3) SA 212 (N), at 216G-H.

[19] It would be difficult to deny that the reasons advanced by W/O Zono constitute reasonable grounds to have underpinned his belief that he would have been issued with a search warrant if he had applied. The requirements of section 22(b)(i) seem to have been met. It is, however, the requirements of section 22(b)(ii) that are cause for concern. To that effect, W/O Zono merely stated as follows:

‘It was Friday afternoon, and I had no reason to believe I would be able to obtain a warrant for the removal of the cattle on Friday, 27 October 2023. I was of the opinion that I would only be able to obtain a warrant on Monday, 30 October 2023. I was confident that a warrant would be issued had I had sufficient time to request one, as there was strong evidence to suggest that the cattle belonged to the University of Fort Hare and had been stolen.

...I thought that if I waited until I could get a warrant on Monday, 30 October 2023, the cattle would have been removed or stolen.’

[20] Later, W/O Zono went on to reiterate that:

‘The cattle were located on a Friday, they bore the University of Fort Hare ear tags, and they were being sold. I believed that if they were not removed immediately, by Monday, which is the earliest I could have got a warrant, they would have been removed or sold.’

[21] Crucially, the police official in question failed to explain why he believed that the cattle would not have remained at Stanford Park over the weekend. There is no evidence that Mr Mthembu was aware of any imminent intention on the applicant’s or anyone else’s part to have sold the cattle. His visit to the farm earlier on 27 October 2023, under the pretence of being a potential buyer, would surely have persuaded the applicant to have kept the cattle exactly where they were, in anticipation of a sale, rather than spirit them away as counsel for UFH suggested. An added difficulty for the respondents is that W/O Zono failed to explain why he did not attempt to contact the

applicant at the time for a satisfactory account of his possession of the cattle.¹¹ There is also no indication why the police official could not have waited, at the very least, for the return of the owner of the farm, Mr Elie Klopper, later that day, to make further enquiries before deciding that no search warrant was necessary.

[22] On the papers, there is simply no evidence from which to conclude that there were reasonable grounds for W/O Zono's belief that the cattle would not have remained on the farm were he to have waited until 30 October 2023 to obtain a warrant. It cannot be said that the requirements of section 22(b)(ii) of the CPA were met.

Interlocutory interdict

[23] The meaning of a *prima facie* right was addressed in the *locus classicus*, *Webster v Mitchell*,¹² where Clayden J held as follows:

'[T]he right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is "*prima facie* established though open to some doubt" that is enough...

The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant, he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the

¹¹ In terms of section 2 of the Stock Theft Act 57 of 1959, any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence.

¹² 1948 (1) SA 1186 (W).

meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.’¹³

[24] This was modified to some extent in *Gool v Minister of Justice*,¹⁴ where Ogilvie-Thompson J stated:

‘With the greatest respect, I am of opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant’s own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to that qualification, I respectfully agree that the approach outlined in *Webster v Mitchell*... is the correct approach for ordinary interdict applications.’¹⁵

[25] UFH asserts that it has a *prima facie* right to the relief sought in terms of the counter-application because it has a financial interest in the outcome of the pending criminal investigation. The sale of the cattle was done without proper approval and was contrary to its policies. Whereas UFH admits receipt of R 196,374 from the applicant, it argues that this was ‘far below market-related value’. SAPS alleges the large-scale theft of cattle from UFH; its investigation into the facts is ongoing. The applicant, in contrast, denies any wrongdoing and points out that he has always dealt with Mr Potgieter; he also alleges, without substantiation, that the purchase price paid for the cattle was indeed market related. Significantly, he chooses not to disclose the price that he received per kilogramme for subsequent sales to third parties.

[26] The degree of detail supplied by UFH in support of its assertions is not, admittedly, overly generous. It has not, for example, indicated why the price paid by the applicant for the cattle was so far below market value. Similarly, SAPS has not disclosed

¹³ At 1189.

¹⁴ 1955 (2) SA 682 (C).

¹⁵ At 688D-E.

much information about its investigation and the extent to which the applicant and Mr Potgieter are implicated, although it can be surmised that this was done to avoid undermining the criminal proceedings that could follow. All that is necessary for UFH to demonstrate, however, is that it has a *prima facie* right to the relief sought. Whether Mr Potgieter had the requisite authority at the time, whether the sale contravened UFH's policies, whether there was collusion with the applicant to defraud UFH, whether the price paid was market-related or not, are all issues that fall for later determination. The allegations made by UFH, supported as they are by SAPS, are sufficient to demonstrate a *prima facie* right to interdict the applicant from selling or disposing of the cattle, pending the outcome of the investigation. Considering the inherent probabilities, it can and should be held that UFH would obtain final relief based on the facts presented. Although it cannot be said that UFH's assertion of a *prima facie* right in relation to the relief sought is not free of a measure of or at least some doubt, especially in the absence of precise reference to the policies involved or comparative market values for the cattle in question, the applicant has advanced no evidence to cast serious doubt upon the facts that UFH has presented.

[27] Regarding the other requirements for interim relief, if the order sought in the counter-application is not granted to UFH, then there is a strong likelihood that the applicant will, sooner or later, sell or dispose of the cattle. He is a cattle trader. He has already sold more than half of the herd that he purchased from Mr Potgieter in the previous year. It is difficult to refute the contention that the applicant's sale of the remaining herd to unknown third parties will result in severe financial prejudice for UFH if it is ultimately found that the applicant purchased the cattle at far below market-related prices. For as long as the cattle remain in the applicant's possession, there is some sort of security against UFH's potential loss. Similar reasoning applies in relation to the balance of convenience. If the spoliation order is granted, as the court is inclined to do, and the cattle are returned to the applicant, then the prevention of their sale or disposal can be accommodated without much difficulty. The same cannot be said for UFH if interim relief is not granted. Finally, the counter-application was brought as alternative to opposition to the main application; if such opposition proves unsuccessful, then, without

an undertaking from the applicant, UFH is left with no remedy to prevent the sale or disposal of the cattle.

[28] Mention must be made, briefly, of the applicant's argument that the relief sought under the counter-application amounts to an anti-dissipation order. In *Knox D'Arcy Ltd and Others v Jamieson and Others*,¹⁶ the erstwhile Appellate Division indicated that the effect of such an order was to prevent a respondent from freely dealing with his or her property, to which the applicant lays no claim. The latter is required to demonstrate that the former is ridding him- or herself of funds or other assets with the intention of defeating the claims of creditors.¹⁷ That is not the situation here. The applicant is not attempting to rid himself of cattle to which UFH has no claim, to frustrate payment of a debt. The facts of the present matter do not give rise to the question of whether an anti-dissipation order is available to UFH.

Relief and order

[29] The court, in the end, is persuaded that SAPS failed to meet the requirements of section 22(b)(ii) of the CPA when W/O Zono and other police officials confiscated the cattle. The spoliation order must be granted, subject to the stipulation of a reasonable timeframe within which the cattle must be returned. Nevertheless, the court is also satisfied that UFH has proved that it is entitled to the interim relief sought and that the applicant must be interdicted from selling or disposing of the cattle, pending the outcome of the ongoing criminal investigation. The relief cannot, however, be granted indefinitely. It constitutes, potentially, a serious restriction on the applicant's right to the use and enjoyment of his property if the investigation finds no evidence of collusion between Mr Potgieter and the applicant to defraud UFH. For the latter to seek interim relief until the conclusion of the investigation and the date upon which the National

¹⁶ 1996 (4) SA 348 (A).

¹⁷ See, too, *Carmel Trading Co Ltd v Commissioner of South African Revenue Service and Others* 2008 (2) SA 433 (SCA). The above decisions were considered in this division by Bloem J in *Masiza v Masiza and Another* [2017] JOL 38086 (ECG).

Prosecuting Authority ('NPA') decides not to institute, alternatively to abandon, proceedings is excessive in the circumstances. The order must be tailored accordingly.

[30] Regarding the application for a spoliation order, there is no reason why the general rule must not be applied in relation to costs. The applicant is entitled to the recovery thereof; scale B will suffice. UFH sought no costs in relation to its counter-application.

[31] Consequently, the following order is made:

(a) in relation to the main application:

- (i) the first respondent, alternatively the second respondent, is ordered to return to the applicant within 48 hours the cattle bearing the following ear tags:

- (aa.) 21.94;
- (bb.) 21.96;
- (cc.) 21.98;
- (dd.) 22.18;
- (ee.) 22.06;
- (ff.) 22.08;
- (gg.) 22.04;
- (hh.) 21.104;
- (ii.) 22.16;
- (jj.) 21.88;
- (kk.) 21.100;
- (ll.) 22.10; and
- (mm.) 22.100;

- (ii) the first respondent, alternatively the second respondent, is ordered to do so by delivering the above cattle to the farm, Stanford Park, situated in the district of Adelaide;
- (iii) the respondents are liable jointly and severally for payment of the applicant's costs, in the event of one paying the other to be absolved;

(b) in relation to the counter-application:

- (i) the applicant is interdicted and restrained from selling or disposing of the cattle described in paragraph (a)(i), above, pending:
 - (aa) the date upon which the criminal investigation instituted under Alice CAS 130/10/2023 is concluded;
 - (bb) the date upon which the NPA decides not to institute, alternatively to abandon, such criminal proceedings as may arise from Alice CAS 130/10/2023; or
 - (cc) the date upon which any other competent court orders otherwise;
- (ii) the order made in terms of paragraph (b)(i) shall, notwithstanding, lapse after the expiry of six (6) months, calculated from the date hereof;
- (iii) the applicant is ordered to keep the above cattle safe, well-fed, and in good condition, pending the dates contemplated in paragraph (b)(i); and
- (iv) each party is ordered to pay its own costs.

JGA LAING
JUDGE OF THE HIGH COURT

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