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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG**

CASE NO: 13/43964

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

E DUMA TRADING ENTERPRISES CC

Applicant

and

SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD

Respondent

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] On 10 December 2013, after listening to full argument in this application and thoroughly considering the issues therein raised, I handed down the following order with a promise to deliver the reasons for the order in due course:

1.1 *“The application is dismissed with costs;*

1.2 *Reasons will follow.”*

[2] Hereunder follows the reasons for the above order.

ORDERS SOUGHT IN NOTICE MOTION

[3] The applicant issued or launched this application on an urgent basis for the following orders:

3.1 That the application be enrolled and heard as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court and the court hearing this matter dispense with strict compliance with the forms and service and grant the applicant condonation for non-compliance with both Rule 4 (service) and Rule 6 (notice and time limits) to the extent necessary;

3.2 That the applicant's possession of the truck, SCANIA 2012, G460, CA 6x4 MHZ Opicru, Engine No. DC 13106L018198553

and Chassis No 9BSG6X40003813705 (*“the truck”*) with registration letters and numbers [.....] be restored to it;

- 3.3 That the respondent deliver/surrender the truck and its keys to the applicant at the applicant’s address within twelve (12) hours of this order;

Alternatively,

- 3.4 That pending the finalisation of the dispute between the applicant and the respondent –

3.4.1 The respondent restore possession to the applicant of the truck or an equivalent truck;

3.4.2 The respondent deliver or surrender the truck or its equivalent and its keys to the applicant at the applicant’s address within twelve (12) hours of this order.

- 3.5 That the respondent be ordered to pay the costs of this application on a punitive scale of attorney and own client; and

- 3.6 Granting further and/or alternative relief.

[4] The application is opposed by the respondent who, in addition to filing its answering affidavit, also filed a conditional counterclaim in the following terms:

4.1 That the applicant be ordered to forthwith place the respondent in possession of the truck; and

4.2 That the applicant be ordered to pay the costs of the applications.

THE PARTIES

[5] The plaintiff is a close corporation duly registered and incorporated in terms of the Close Corporations Act of the Republic of South Africa ("RSA") with its registered address situate at [.....].

[6] Mr Elijah Duma is an adult male person and also the sole and managing member of the applicant, residing at the same address as the plaintiff's.

[7] The applicant's core business is freight transport.

[8] The respondent is a limited liability company duly registered and incorporated under the company laws of the RSA, with its principal place of business situate at [.....].

ESSENCE OF THE APPLICATION

[9] The applicant contends that its peaceful and undisturbed possession of the truck was spoliated by the respondent by removing the truck from its possession and depriving it permanently of its possession.

[10] The respondent denied spoliating the applicant. It instead argued and submitted that the applicant willingly and/or voluntarily returned the truck to it because it was unable to meet its financial obligations, namely the agreed upon instalments. Among other things, like repudiating its lease agreement with the respondent by its conduct.

FACTUAL MATRIX

[11] The two parties relayed diverging stories about what actually happened in the lead up to this application.

Applicant's version

[12] According to the applicant, it entered into an agreement with the South African Breweries Ltd (“SAB”) in November 2012 for the applicant to deliver SAB’s products to various outlets and businesses. The scheme followed in terms of the above agreement is called the “SAB Owner-Driver Scheme”.

[13] In order to operate optimally and to efficiently execute its obligations in terms of the above agreement, the applicant sourced the truck, to wit, a new Scania truck bearing the identifying features set out hereinbefore in terms of a written Financial Lease Agreement (*"the lease agreement"*).

[14] According to the plaintiff further, it has never defaulted on its obligations in terms of the lease agreement and has always timeously fulfilled all its obligations in terms of the lease agreement, including but not limited to paying lease payments, taking out and paying for services and maintenance responsibilities as well as taking out insurance for the truck.

[15] It is the applicant's case further that despite the above lease agreement, it continually looked for new and/or more profitable freight contracts as in its assessment through its managing member, the SAB Owner-Driver Scheme was not profitable and had onerous conditions that stifled growth. It was in that context, offered a more lucrative contract by another company which it was to start with from November 2013.

[16] The applicant refused to disclose the names of the new partner or contractor, invoking confidentiality clauses in the agreement it had signed with that partner or contractor.

[17] It then allegedly gave the SAB a month's notice of termination of their Owner-Driver Scheme agreement on 7 October 2013.

[18] It awaited the notice period to expire in November 2013 before it started operating on the new secretive project or agreement. The applicant did not specify the dates relevant to the conclusion of this new agreement or when it intended specifically to start operations at the new venture.

[19] It should be mentioned at this juncture that the applicant's lease agreement with the respondent remained in place and fully operational or in force.

[20] According to the applicant further, on 28 October 2013, its managing member was invited to the offices of the respondent by one Bennie Vorster ("Vorster"), a representative of the respondent. Upon his arrival there, after parking the truck outside the respondent's business premises, he was told by Vorster that the respondent was repossessing the truck because it (applicant) had cancelled the freight agreement with SAB. Vorster then demanded the truck keys and he handed them over to him, after unsuccessfully trying to plead with Vorster not to repossess the truck and pointing out to him how arbitrary and unjust as well as harmful to the applicant's business that conduct was.

[21] Mr Duma then approached his attorneys with a view to the latter securing the return of the truck as the new freight deal with the new people needed the truck for the agreement to become *perfecta*.

[22] According to the applicant, the respondent responded to the above by informing it that it was proceeding to dispose of the truck in order to limit its or any financial losses that may be incurred.

Respondent's version

[23] According to the respondent, it was approached by the SAB as a part of a black economic empowerment initiative to assist SAB's drivers at the time to become the so-called "*Owner-Driver Operators*". That was during the early part of the year 2011. The proposal suggested by SAB was that each (or some) of their existing drivers would be assisted by a business advisor to set up a company or close corporation so that and to, on a contractual basis, render freight or transport services to SAB.

[24] The respondent was to lease its vehicles on subsidised terms to the entities owned by the individual drivers formerly employed by SAB, with the *proviso* or condition that SAB make payment of the rentals due in terms of the lease agreement for and on behalf of the entities concerned directly to the respondent.

[25] The respondent was initially not prepared to participate in this scheme but was pacified by the fact that SAB will pay the rentals on behalf of the entities. It entered into 52 lease agreements with numerous entities beneficially owned by the drivers formerly employed by SAB. The terms were extremely generous: instead of the usual four year lease terms, these entities' lease periods were seven years.

[26] The applicant is one of those entities. It concluded the lease agreement with the respondent on or about 5 December 2012.

[27] The applicant's lease agreement, just like the other 51 contained termination provisions. As part of the lease agreement a facility letter was issued to the applicant. It provided in no uncertain terms that the respondent "shall" be entitled to cancel the lease agreement should the contract between the applicant and SAB be cancelled. The material part of the facility letter reads as follows:

"It is explicitly understood that the basis of providing the finance lease facility stated herein is based on the 10 year owner driver transporters contract from South African Breweries. Should this contract be cancelled, breached or should E DUMA TRADING ENTERPRISES CC choose to no longer operate on this contract, it will be viewed as a breach of the finance lease agreement and SFZ will be entitled to enforce immediate termination of the finance lease agreement at its exclusive choice."

[28] The applicant, so continued the respondent, inexplicably and/or for reasons unknown to the applicant, elected to voluntarily terminate his cartage agreement with SAB, which fact came to the knowledge of the respondent on 21 October 2013 through an e-mail received from one Dreyer du Bruyn, a customer service manager in the employ of SAB. The respondent elected to terminate the lease agreement on 22 October 2013 through a notice sent to the applicant's business advisor or go-between between it and the applicant, which notice was also sent to the plaintiff's sole member (Mr Duma) at his business address at the SAB depot. The applicant acknowledged receipt of

this notice by referring to it in a letter (of demand) it sent to the respondent dated 8 November 2013.

[29] The facility letter also provides that the respondent's general terms and conditions apply to the lease agreement concluded with the applicant.

[30] According to the respondent further, as at 28 November 2013 when its answering affidavit was deposed to, the applicant had last paid its monthly rental for October 2013, thus having breached the lease agreement further. No tender of the arrear amounts totalling the amount of R17 057,14 as at that date was made, presupposing that the applicant was intending to and even using the truck without paying for it, which was also a specific term of the lease agreement, the breaching whereof entitled the respondent to cancel the lease agreement.

[31] After the lease agreement was terminated the respondent demanded the return of the truck, which demand or request was ignored by the applicant. The purpose of the applicant's managing member's call to present himself at the respondent's offices was to afford him the opportunity to substantiate to the respondent whether it would be financially wise or desirable that he be allowed to re-negotiate the lease over the truck, which he was obliged to return to the respondent because the lease over it had been terminated.

[32] Unannounced and without having made an appointment, Mr Duma rocked at the respondent's Alrode offices on 28 October 2013. He met with

Vorster of the respondent. The truck was parked outside the offices in the street on the kerb.

[33] According to the respondent, this meeting went as follows:

33.1 Mr Duma indicated that he had brought the truck in as requested and that he wanted to conclude a new lease agreement with the respondent in respect of the new freight or cartage agreement he had signed.

33.2 Vorster explained to him that that was a completely new deal to be negotiated requiring fresh processes before a decision could be taken whether that new deal could be granted or concluded, and that the return of the truck had nothing to do with that process.

33.3 Mr Duma accepted the explanation offered to him by Vorster and indicated that in those circumstances he would hand over and leave the truck with the respondent. At Vorster's request, Mr Duma on his own went outside in the street and drove the truck into the yard of the respondent, parking it next to the maintenance bays. He then came back to the boardroom wherein he met with Mr Vorster and where the latter had remained seated. He handed over the truck's keys to Mr

Vorster. He then left after indicating that he will come back and re-apply for a new lease agreement the following week.

33.4 It occurred that at that stage, the applicant had already sent in a new credit application to its business advisor for transmission to the respondent.

[34] Consequently, according to the respondent, contrary to the applicant's claim that the respondent spoliated it of the truck, the plaintiff surrendered the truck to the respondent of his own volition.

[35] The respondent submitted further that should it be that there is any doubt as to the cancellation of the lease agreement at the time it did, it was cancelling it. Furthermore, the respondent was entitled to cancel the lease agreement and concomitantly repossess the truck irrespective of whether the lease agreement was cancelled or not.

[36] Alternatively, in the event of this court finding that there is any merit in the applicant's claims of being spoliated, then the respondent asks that orders be granted to it in terms of its counter-application.

ANALYSIS OF ISSUES RAISED

[37] This Court finds that there is sufficient urgency justifying this matter being heard on an urgent basis.

[38] The rental or lease agreement contain at the end of the first page thereof the following endorsement:

“This agreement comprises this Contract Schedule and Terms and Conditions. Please ensure that you have read and fully understood the Terms and Conditions and that you undertake to be bound by those terms.”

[39] The terms and conditions form part of the papers filed of record herein.¹

[40] The applicant attempted to claim that he was not aware of the facilitation letter mentioned above, claiming further that a similar letter he was aware of was another that is attached to the papers herein at folio 18. Unfortunately the document at folio 18 is unsigned or not fully signed, unlike the facilitation letter. It also looked like a piece of scrap paper.

[41] The letter from the respondent to the applicant terminating the lease agreement dated 22 October 2013 reads as follows where it matters:

“RE: TERMINATION OF FINANCIAL LEASE AGREEMENT AS LISTED BELOW

Dear Sirs,

1. ...
2. *Based on the formal notification that your Owner Driver Cartage Agreement with South African Breweries has been cancelled resulting in the payment stream required for the fulfilment of*

¹ At paginated folios 47-52.

your Scania Finance Southern Africa (Pty) Ltd financial obligations ceasing, we have elected to terminate the agreement with you.

3. *In the circumstances, we call upon you to immediately deliver up possession of our equipment, being as listed below. Our equipment should be returned to us at the nearest Scania branch or SAB depot, by no later than close of business, 22nd October 2013."*

[42] The equipment is described in this letter at the bottom. It is the truck in question here.

[43] The respondent emphasised that far from having taken the vehicle from the applicant, the applicant surrendered the vehicle to the respondent of his own volition and that Mr Duma did so as he hoped to conclude a new lease or rental agreement with the respondent. As such, the hand over of the truck by the applicant to the respondent was not unlawful and cannot constitute spoliation.

[44] The respondent's primary defence is thus a denial of spoliation.

[45] The law relating to *mandament van spolie* (spoliation) is succinctly summarised in *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co Ltd (In Vol Liqui)*² where the court held as follows at 99-100:

"Two factors are requisite to found a claim for an order for restitution of possession on an allegation of spoliation. The first is that the applicant was in possession and the second that he has been wrongfully deprived of that possession against his wish. It has been laid down that

² 1948 (1) SA 91 (W).

there must be clear proof of possession and of the illicit deprivation before an order should be granted. See Rieseberg v Rieseberg 1926 WLD 59 at 65. It must be shown that the applicant had had free and undisturbed possession. (Hall v Pitsoane 1911 TPD 853). When it is shown that there was such possession, which is possession in physical fact and not in the juridical sense, and there has been deprivation, the applicant has a right to be restored in possession ante omnia. On a claim for such restoration it is not a valid defence to set up a claim on the merits."

[46] The guiding words here are "wrongful and/or "illicit" deprivation.

[47] The evidence in this application, contrary to the plaintiff say-so that he was illicitly deprived of possession of the truck, point in the other direction. The lease agreement between the applicant and the respondent over this truck had been terminated. There is proof of such termination. The applicant knew at the time he entered into the lease agreement with the respondent that the lease or use of this truck was conditional on it undertaking the cartage contract in terms of the freight agreement it had signed with the SAB and that should this agreement come to an end for one or other reason, the lease agreement would be cancelled.

[48] The applicant, proceeded to cancel his freight agreement with SAB as he had already negotiated a more lucrative contract elsewhere. This was diametrically contrary to the clear terms of his agreement with the respondent.

[49] Furthermore, the respondent did not chase after the applicant and forcibly or by sleight of hand unlawfully or wrongfully deprived it of its possession of the truck. He informed the applicant of its cancellation of the

lease agreement due to its (applicant's) breach of the terms thereof. The applicant's Mr Duma went to talk to the respondent's employees who painstakingly explained to him the implications of the cancellation. He (applicant) on his own, went outside the respondent's premises to where he had parked the truck, drove it into the yard and handed over the keys to the respondent's employee who was all the time seated inside the boardroom. There is also evidence that the applicant had at that stage understood and agreed with the reasons why it had to hand in the truck to the respondent. At this stage further, it had already submitted through its agent or business advisor, a new application for a lease that would involve the new company he was to undertake freight services for. That in my considered view points to the applicant having clearly known that the truck had to be handed in or he ought to have known, otherwise he would not have made a fresh application for the re-lease of the same truck.

[50] From the facts laid before this Court by both parties as well as the probabilities inherent herein, it is my finding that no spoliation took place in this case. The principles relating to self-help as enunciated in *Nino Bonino v De Lange*³ relating to the taking of the law into one's hand do not apply. There cannot be any question of any restoration of the so-called "*status quo ante*".

[51] The applicant of his own accord handed over the truck to Mr Vorster of the respondent.

³ 1906 TS 120, at 122.

[52] It is common cause that had the respondent favourably considered the applicant's new lease application, this matter would not have been before this Court. It is an inescapable conclusion that these spoliation proceedings were resorted to as an after-event after failing to secure a new lease agreement. The applicant does not disclose whether or not his new partner or cartage contractor was also prepared to offer the respondent similar or comparable terms like paying the truck rentals directly to the respondent and on heavily subsidised terms as were offered by SAB.

[53] I consequently find it unnecessary to proceed dealing with the rest of the principles under pinning *mandament van spolie* especially when the common facts and/or relevant facts of this matter are anything to go by.

[54] The applicant stands to fail in its application, which is the exact finding I arrived at when the initial order pending reasons was handed down on 10 December 2013.

ORDER

[55] Consequently, the order granted on 10 December 2013 is hereby confirmed. For the sake of convenience, it is as follows:

“The application is dismissed with costs.”

N F KGOMO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	10 DECEMBER 2013
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