

**REPUBLIC OF SOUTH AFRICA  
THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO:051531**

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED: YES

Date: 29 June 2023

**In the matter between:**

**LACRUMBS TRADING AND PROJECTS**  
REG NO.2006[...]

**APPLICANT**

**AND**

**THE MINISTER OF POLICE**

**1ST RESPONDENT**

**THE STATION COMMANDER  
MOOT POLICE STATION**

**2ND, RESPONDENT**

**THE COMMANDING OFFICE'S  
VEHICLE IDENTIFICATION**

**3RD RESPONDENT**

**JUDGEMENT**

**BOKAKO AJ**

**INTRODUCTION**

1. This is an urgent application to restore possession of a truck that was confiscated by members of the South African Police Service (SAPS) from the applicant back again to the applicant.
2. The respondent opposed the application because no spoliation took place, as the disposition was that the said truck was registered stolen.
3. The respondent alleges that Mr. Khoza had unlawfully sold the vehicle to the applicant. He was not the truck's owner.
4. Further, Mr. Khoza did not obtain permission from the Complainant before selling the vehicle to the applicant.
5. When the matter was called, I heard arguments from the parties on the application's urgency and background facts. The members of (SAPS) confiscated this truck as they had identified it and marked it as a stolen vehicle.
6. This application aims to obtain an order that the First, Second, and Third Respondent restore to the Applicant a UD Truck bearing registration number DD[...] with Vehicle register number TW[...] that the Respondents be directed to remove the "S" mark that was placed on the truck.
7. Further, requesting an order declaring that the Seizure of the Motor Vehicle, namely a UD TRUCKS bearing registration number DD[...] and registration letters and numbers TW[...], at the instance of the First and Second Respondent, is unconstitutional and
8. The First, Second, and Third Respondents are directed to restore the Possession of the UD TRUCKS with registration number DD[...] to the applicant and the Respondents to pay costs if this application is opposed.

### URGENCY

9. The issue of urgency has been dealt with, and the court has found that the applicant's application is urgent and has enrolled it as such. It is trite that mandament van police is directed at restoring possession to a party unlawfully dispossessed, irrespective of the control or ownership. In *Ngqukumba v Minister of Safety and Security and Others*<sup>1</sup> Madlanga J said:

"The essence of the amendment van police is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the spoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than following the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the management van police is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due processes."

10. The requisite for granting a spoliation order is that the despoiled person must prove that he was in possession of the object and was unlawfully deprived of control. The respondent has conceded that the applicant had the vehicle but denied that he was wrongfully deprived of possession. According to the respondent, the applicant was in control of a stolen truck, and such was communicated to the applicant. The applicant voluntarily renounced its possession because he feared being arrested for something he did not know. It is not in dispute that, at the time, the applicant did not understand that the seller of the truck was not an owner of the truck and that it was stolen.

11. This court must determine whether the applicant was unlawfully deprived of his possession. In *Schubart Park Residents' Association v City of Tshwane*<sup>2</sup> it was held that a spoliation order does not determine the lawfulness of competing claims to the object or property, and for this reason, there are, under common law, only a limited number of defenses available to a spoliation claim, impossibility being one of them.

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<sup>1</sup> [2014] ZACC 14 (15 May 2014) at para 10

<sup>2</sup> 2013 (1) SA 323 (CC) at para 24

## **APPLICANT'S SUBMISSIONS**

12. According to the applicant, his company purchased a motor vehicle (truck) on 12 January 2022 with a UD TRUCK bearing registration number DD[...], white in color with chassis numbers and letters ADD[...] from DMD Holdings; he agreed with Mr. Khoza. His company has a contract with Eskom to supply coal. The truck was purchased for the sole purpose of transportation of coal. On 17 January 2022, he attendant to the traffic department to register the truck. The report did not indicate that the truck was stolen.

13. On or about April 2023, he received a call from a Police officer who introduced himself as Mr. Machate from VIS in Pretoria and informed him that they were looking for the truck as it had been reported stolen.

14. These developments took him aback. He was told that an "S" mark would be placed on the vehicle and that it would be confiscated upon any police stop or traffic stop. He was also called by another Police officer who introduced himself as Mr. Segokodi from the Moot police station attached to the VIS unit. He said he would be arrested if he did not cooperate with the police. He was scared as he had never been arrested before. He then reverted to Donald Smangaliso Khoza of DMD Holdings, who sold him the truck. He assured the applicant that the truck was not stolen and wrote a letter stating that he had sold it to him.

15. He communicated with Mr. Segokodi and Mr. Machate and impressed them with his truck possession; the officers were persistent in impounding it. They asked for the truck's location and told him they would arrest him if he failed to corporate. On 6 May 2023, he forwarded the truck's location to the officers, and they arrived at his place of business and impounded the car. He did not consent to the seizure of the truck.

16. The applicant learned that Donald Smangaliso Khoza's wife opened the criminal case. This criminal case has nothing to do with the transaction they concluded with DMD Holdings. The applicant contends that before purchasing the

truck, he made the necessary inquiries at the traffic department, and there was no "S" mark on the vehicle.

17. Since an "S" mark has been placed on the truck, the applicant was and is still unable to access and utilize it for business. The truck has a designated driver who earns an amount of R30 000.00 per month. The truck does three loads per day from Elandsfontein Mine in Gauteng to Majuba Power station, making an amount of R25 806.00 daily.

18. He contends that he has been in lawful possession of the abovementioned truck without being disturbed since 12 January 2023. The seizure of the truck by the Police officers is both unlawful and unconstitutional. Their actions are detrimental to the well-functioning of his business because he needs to adhere to the contract signed with Eskom to supply the necessary coal. He is suffering financial losses and the risk of losing his contract.

## **RESPONDENT'S SUBMISSIONS**

19. Respondent opposed this application in that this application is not urgent, in that the applicant delayed in bringing this application, and that the applicant does have substantial redress at a hearing in due course. Further contending that the applicant has failed to join the necessary party, who is the complainant in the pending criminal proceedings, the party that bought the truck, and the owner of the truck. For the applicant to succeed with a spoliation application, he needs to demonstrate, establish and satisfy that he has been in peaceful and undisturbed possession; it was unlawfully deprived of the property.

20. It was submitted that the application needs to be amended for the failure of the applicant to join Ms. Refilwe Semakeng Gontse Mokoena in the current proceedings. Ms. Moekoena is a complainant in the pending criminal proceedings, wherein the truck the applicant wants to be restored to his possession is the subject of the proceedings. Allegedly the complainant is the one that bought the truck, and she is currently waiting for members of the South African Police Services to hand the truck over to her as the truck has been confiscated from the applicant.

21. It was further argued that she has a direct and substantial interest in this matter in that the property that she paid for could be handed over to another person. The respondent referred to several case laws related to the above. Counsel for the respondent submitted that the truck was not unlawfully confiscated from the applicant; it was taken lawfully. The said truck was identified and registered as a stolen vehicle. The law enforcement officials had a legal duty to act as they did, that is, to confiscate the truck from the applicant, as the truck was the subject of ongoing criminal investigation and pending criminal cases. Therefore the applicant was in unlawful possession of the truck, as the truck was registered as stolen property. If the law enforcement official had not taken the truck from the applicant, they would have breached their legal duty. They concluded that the remedy of spoliation is not available to a party that has been lawfully deprived of property.

## CONCLUSION

22. it is not in every case in which the applicant may have departed from the Rules to an unwarranted extent that the appropriate remedy is the dismissal of the application. Each case depends on its particular facts and circumstances.

23. This is implicitly recognized by Kroon J in the Caledon Street Restaurants CC case when he held - looking at the issue from the other perspective, as it were - that the 'approach should rather be that there are times where, by way of non-suiting an applicant, the point must be made that the Rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a time or not.'

24. Quite apart from the merits, it was argued that the application should be struck from the roll on either of the above main grounds. In that, the complainant is the one that bought the truck, and she is currently waiting for members of the South African Police Services to hand the truck over to her as the truck has been confiscated from the applicant, and she has a direct and substantial interest in this matter, in that her property that she paid for could be handed over to another person.

25. I proposed to deal with the question of urgency and the application's merits regarding the conclusion I have reached.

26. When considering the launch of an urgent application, not only the convenience of the parties but the court and all issues relevant to the reasonableness of the time limits imposed against the size of the papers and complexity of the matter must be weighed, carefully considered, and applied.

27. I have carefully set out the principles applicable to urgent applications above and in some detail. I emphasize that there are degrees of urgency, each of which must be justified on the papers after careful consideration by an applicant when launching an urgent application.

28. The respondent informed the applicant that if it appears that he was indeed in possession of such a truck, that truck has been fraudulently sold to him, and the South African Police Services investigate the matter, and there is an "S" mark on the vehicle, meaning that it is marked stolen. The respondent was indirectly threatening the applicant with the arrest, which in turn will render the applicant to be vulnerable and also to be in weaker bargaining power.

29. The respondent was in a position of authority and was using tactics that would ultimately cause the applicant to provide them with his location. Hence, the applicant stated in his founding affidavit that he was scared and did not want to be arrested.

30. That resulted from the tactics the respondent had applied to the applicant, which led the applicant to be vulnerable and weak, ultimately acceding to the respondent's demands.

31. The requirements for undue influence were formulated in *Patel v Grobbelaar* that a party must prove (i) that the other party exercised an undue influence over him; (ii) that the influence weakened his powers of resistance and made his will pliable; and (iii) that the other party exercised his influence in an unscrupulous manner to induce consent to a transaction (a) which is to the detriment and (b) which he, with ordinary free will, would not have concluded.

32. According to the applicant, he had already paid Mr. Khoza R350 000.00. The applicant would not have easily surrendered the vehicle without a fight after having parted with such a large sum of money. Both parties signed a contract.

33. This court finds that the respondent had threatened to arrest the applicant and, because of this threat, resulted in the applicant providing his location because he did not want to be involved in any criminal act. The applicant did not voluntarily hand over the truck.

34. The respondent needed to place relevant facts before this court as to when the truck was stolen. No material or convincing information was submitted by the respondent. The emphasis was about a stolen truck without any determination that this truck was indeed stolen and by whom.

35. Allegedly there is a pending case dating back to year 2021, this court was not afforded with the docket or summary of substantial facts regarding the pending case or investigation and or progress update regarding this pending matter.

36. The complainant in the pending case is said to be the wife of Mr. Donald Smangalis Khoza. (the seller). It is also not disputed that the CAS 320/09/2021 dates back to the year 2021, such indicates that this criminal matter was opened way before 12 January 2022. And the Police officers only contacted the Applicant in April 2023. There is no doubt that the Respondents were negligent in their duties. The applicant went to the extent of registering the said motor vehicle successfully on 17 January 2022. No mark or red flag suggested that the truck was stolen. The issue of the "S" mark was only communicated to the applicant in the year 2023.

37. When the applicant purchased the truck, it belonged to DMD HOLDINGS. The applicant was never called to make a witness or warning statement as a suspect in any criminal proceedings. The applicant strongly believes he is caught in the middle of Mr. Khoza and the complainant's relationship problems.



38. In Ngqukumba's<sup>3</sup> case the High Court declared the search and seizure of the vehicle unlawful but held that the return of the vehicle is prohibited by the Act. Mr Ngqukumba was unsuccessful in the Supreme Court of Appeal and then approached the Constitutional Court. In a unanimous judgment, the Court held that the purpose of the spoliation remedy is to restore possession to an unlawfully deprived possessor, in order to preserve public order and to prevent self-help. The remedy is consonant with the rule of law, a founding value of the Constitution. The Court reasoned that the Act prohibits and criminalises possession of a tampered vehicle only if the possession is without "lawful cause". Thus the return of a tampered vehicle to the person deprived of its possession would not necessarily be unlawful. An enquiry into lawfulness of possession would defeat the purpose of the spoliation remedy. The Court held that, in combating and preventing crime, SAPS too must observe the law. The Constitutional Court ordered the return of the vehicle to the applicant. Judgment: Madlanga J (unanimous). The Court held that, in combating and preventing crime, SAPS too must observe the law. The Constitutional Court ordered the return of the vehicle to the applicant. The circumstances in the above-mentioned reference are severe and of serious nature comparatively to this case. When the truck was taken to respective licensing department, it was assessed and inspected and report was positive, there was no "S" mark, meaning that the said truck was roadworthy and without red flags. That was on or around January 2022.

39. In this case, the court is satisfied that the applicant was unlawfully dispossessed, such dispossession was not done in the absence of consent nor court order or authorising legislation.

40. It is trite that mere possession is essential and enough to satisfy the locus standi in the case of the mandament van spolie.

41. In this case it is clear that the applicant has proven that he was in possession and that there was unlawful deprivation of possession, that is, deprivation without his consent therefore possession must be restored.

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<sup>3</sup> **Ngqukumba v Minister of Safety and Security and Others Case Number:**CCT87/13:[2014] ZACC 14 2014 (7) BCLR 788 (CC), 2014 (5) SA 112 (CC) 2014 (2) SACR 325 (CC)

42. The possession is represented by the actual exercise of a right. Therefore, refusal to allow a person to exercise the right will amount to a dispossession of the right. The spoliation order is a remedy available in law to protect possession of property. This kind of a remedy results in the restoration of possession to persons who have been unlawfully dispossessed of their property, mandament van spolie by stating that; It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the status quo ante, and will do that as a preliminary to any enquiry or investigations into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear.

43. The applicant is therefore entitled to the relief he is seeking in his notice of motion.

#### ORDER:

44. As a result, I make the following order:

44.1. The application is heard as urgent in terms of Rule 6(12), condoning noncompliance with time limits for service of court documents.

44.2. The respondents are ordered to immediately restore physical possession of the motor vehicle with a UD Truck bearing registration number DD[...] with Vehicle register number TW[...] to the applicant.

44.3. In the event, the respondents failed or refused to comply with the order in Paragraph 44.2. above, the Sheriff of this honorable court is authorized and directed to enforce the declaration described above by removing the truck described above bearing a UD Truck bearing registration number DD[...] with Vehicle register number TW[...] from the unlawful possession of the respondents or from wherever there said the truck may be found, and there

and then restore the applicant's control thereof by handing over the said truck where may be found.

44.4. The respondent must pay the applicant's costs on a party and party scale.

**T BOKAKO**

**Acting Judge of the High Court**

**Gauteng Local Division, Johannesburg**

**HEARD ON: 23 JUNE 2023**

**JUDGMENT DATE: 29 JUNE 2023**

**FOR THE PLAINTIFF Adv. RACHIDI**

**FOR THE DEFENDANT: Adv. A. BLEKI**