REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 100540/2015

5/2/2016

NTHABISENG MAAKE **APPLICANT**

and

ALLIED CAPITAL (PIY) LTD **1st DEFENDANT**

NATIONAL CONSUMER REGULATOR **2nd DEFENDANT**

JUDGMENT

KHUMALO J

INTRODUCTION

[1] In this Application the Plaintiff seeks the immediate return of her motor vehicle described a 2014 Citrine Mercedes Benz C200 bearing registration number: […] ('the vehicle") that the 1st Respondent removed from her allegedly unlawfully, without her consent, (a mandamus action) on 8 December 2015.

[2] The Plaintiff being the registered owner was at all relevant times in possession of the vehicle until it was removed from her by the 1st Respondent.

[3] The 1st Respondent carries business as a credit provider from its offices in Centurion, Pretoria.

[4] The 2nd Respondent the National Consumer Regulator is cited as the statutory body that is charged with regulatory functions of Credit providers with no specific relief sought against it. I will refer to the 1st Respondent as "the Respondent".

FACTUAL BACKGROUND

[5] It is common cause that on 9 March 2015 the Respondent had extended credit to the Applicant in an amount of R30 000. That is what links it with the Applicant. There is a dispute whether or not the debt was settled. Applicant alleges that it was settled whilst the 1st Respondent argues that it is still outstanding.

[6] Following that dispute, in December 2015 the Applicant was accosted by men from the Respondent's company and dispossessed of her motor vehicle whilst it was parked at the Sandton City Mall. She was with her two children aged 16 and 11.

[7] According to the Applicant on 8 December 2015, 4 hugely built men who looked like bouncers ambushed and forcefully dispossessed her of the vehicle notwithstanding her protesting at the time. As that was happening she received a phone call from one Antoinette, an employee of the Respondent informing her that the vehicle must be seized for she signed away her right of ownership to the Respondent, which she vehemently denies. She alleges she was intimidated and felt humiliated by the 1st Respondent's conduct as a result suffered from a severe stress and depression. She therefore consulted her doctor and was admitted to hospital until 11 December 2015, returning to work on 13 December 2015. She was only able to refer the matter to her attorney on 18 December 2015 upon which a demand for the return of the vehicle was made telephonically and a letter sent to the 1st Respondent on the same day. Since her attorneys were going away, she personally went to the 1st Respondent's offices the next day on 19 and on 21 December 2015 to follow up on the demand, followed by e-mails she sent on the same days, but could not get the vehicle back. On the succeeding days she made several calls asking to speak to a Mr Lourens or the managing director without success. 1st Respondent could also not commit that the sale of her motor

vehicle was not imminent therefore she approached the court on an urgent basis on 29 December 2015 seeking the immediate return of her motor vehicle. She alleges to have been in peaceful and undisturbed possession when the vehicle was seized from her by intimidation and force.

[8] According to the 1st Respondent William John Knox ("Knox") and another man from the Rrespondent approached the Applicant on 2 December 2015 at the Sandton City Mall. Applicant voluntarily handed over the keys and the parking ticket to them. They told her she can fetch her belongings that were in the car from their offices in Pretoria and drove off · with the vehicle. They deny that she was dispossessed of the vehicle without her consent and allege that their conduct was in keeping with a prior arrangement agreed upon by the parties sometime towards the end of November 2015, whereupon they arranged that, the Applicant:

[8.1] will surrender the vehicle;
[8.2] enter into a payment proposal to settle the arrear rentals; after which
[8.3] she would be given the vehicle back on condition she settles the arrears.

[9] Respondent alleges further that, following that arrangement Applicant contacted their office on 30 November 2015 to arrange for the return of the vehicle and to schedule a meeting to negotiate a payment proposal. However the Applicant failed to comply with her undertakings as agreed in the prior arrangement. On 2 December 2015, they traced the motor vehicle to be parked at Sandton City Mall in a parking. Knox, the deponent to 1st Respondent's answering affidavit and the other man received instructions from the Respondent office to collect the motor vehicle from the Applicant. The Applicant had left it in the parking lot whilst doing her errands. They waited for her next to the vehicle and on her arrival she freely and voluntarily surrendered the vehicle to them. She also arranged to fetch her belongings that were in the car from the Respondent's office in Pretoria. On 4 December 2015 they received a proposal from her via an e-mail to settle the arrears in three payments, on 7, 11 and 15 December 2015. She only sent a demand for the return of the vehicle on 18th December 2015 when she failed to comply with the proposal, followed by her launch of the urgent Application on 29 December2015 for the urgent spoliation application.

[10] The main question that arises from these facts is whether or not the spoliation remedy, given the facts as alleged by the parties was available to the Applicant? Further allegations made by the parties against each other were speculative, except for the fact that Applicant also referred to her being a registered owner of the vehicle and having settled the debt that 1st Respondent wanted to enforce by attaching her vehicle. The whole matter rested on a balance of probabilities. The onus being upon the Applicant to prove that she has made a proper case for the relief sought.

LEGAL FRAMEWORK

[11] The fundamental principle of our law is that a person should not be disturbed in their possession of property without proper recourse to legal process. That is what informs the remedy of a *mandament van spolie.* Applicant is therefore required to satisfy the court on the admitted or undisputed facts that on a balance of probabilities the motor vehicle that she alleges to have been spoliated by the 1st Respondent was in her possession and that her possession was disturbed by the vehicle's forceful or wrongful removal or that was done against her consent; see *Yeko v Qana* 1973 (4) SA 735 (A) at 739E, *Nienaber v Stuckey* 1946 AD 1049 at 1053. The *mandament van spolie* is therefore a remedy where the possession of a party is protected thus the right to ownership does not play any part in determining such deprivation. Also although it does not resolve the ultimate rights of the parties, it is a final determination of the immediate right of possession. Hence the right of possession is the first element that the Applicant has got to establish; see *Yeko.*

[12] As a result *mandament* is a speedy remedy and the restoration of possession should therefore happen at once. Speedy refers to restoration of possession not in relation to the period within which the application is brought. Therefore this does not mean that because the application is one for a spoliation order, the matter automatically becomes one of urgency; see *Mangala v Mngala* 1967 (2) SA 415 (E) at 416. Restoration takes place immediately but the action taken for restoration must be within a reasonable time. According to Erasmus' Superior Court Practice 2nd Edition by Loggerenberg, 'if the Applicant delayed for more than a ye.ar before bringing the Application there would have to be special circumstances present to allow him to proceed. Conversely, if the application was brought within a year of the act of spoliation,

special circumstances will have to be present for the relief to be refused, merely on the basis of excessive delay. In some cases it might be necessary to determine if the delay was inordinate so as to constitute acquiescence.

Analysis of the facts

The establishment of the right of possession

[13] The Applicant has indicated that she was in undisturbed possession of the vehicle as the owner, a fact that has not been disputed by the 1st Respondent. Consequently there was no issue about the possession its peacefulness or disturbance prior to this incident. Also the fact that she was dispossessed is not in issue. However whether or not Applicant was disturbed or dispossessed wrongfully or forcibly against her consent is what is in issue and the Applicant has to prove. The facts that illustrate how the dispossession took place are of paramount importance and somehow parties present slightly different versions. Which prompted the Respondent's counsel to allege that there is a dispute of fact that requires the matter to be sent to trial.

[14] How the court is supposed to deal with different versions or facts as this is an Application are well expounded in the most cited case as far back as 1949 of *Room Hire Co* (*Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T), when the courts held that the crucial question is whether there is a real dispute of fact. In *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) the Supreme Court of Appeal (SCA) held at par 13 that: 'A rear genuine and *bonafide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact to be disputed.' Also the court will regard a dispute of fact to exist on the basis of what is alleged in the answering affidavit in comparison to the founding affidavit. The Supreme Court of Appeal in *Buffalo Freight Systems {Pty) Ltd v Crestleigh Trading (Pty) Ltd and another* 2011 (1) SA 8 (SCA), considered the apparent dispute of fact and the evidence put up by both of the parties. The court found that it was "inherently improbable to a high degree" that Buffalo Freight Systems would have agreed to the terms of payment alleged by Crestleigh Trading. The court also took into account that the contradictory versions put up in the three affidavits filed on behalf of Crestleigh

Trading.

[15] Applicant alleges that the removal was forceful and without her consent in that she was intimidated to surrender the car by being approached by 4 hugely built men whilst shopping, without warning in a parking in the mall. She was not even allowed to take out her things that were in the motor vehicle. They left with her things; leaving her and the children in the parking mall with a message to collect her things from Pretoria. Applicant says she was intimidated by the men she found waiting for her and shocked since it also happened [the Applicant acquiesced to their demand to hand over the car and even gave them the parking ticket so that they can get out of the parking lot in line with the prior arrangement that she will surrender the car and negotiate a settlement of the debt. However it is also the 1st Respondent's allegation that the Applicant did not comply with the arrangement. That on her failure to surrender the car or to comply with the arrangement they traced the whereabouts of the motor vehicle and sent the two men to repossess the vehicle forthwith without warning the Applicant. That illustrates absence of consent or an agreement whether subsequent to the failure of the arrangement or before. The chance of her willingly acquiescing to the dispossession of the vehicle with her things inside with her children in a parking lot is far- fetched and inherently improbable.

[16] An argument also ensued relating to an email that was alleged to have been sent by the Applicant on 4 December 2015, making an offer to settle the debt in three instalments which according to the Respondent was sent after the recovery of the vehicle whilst Applicant's version is that she might have sent it before the vehicle was repossessed. The Respondent alleges that the Applicant only wrote the letter of the 18th December 2015 demanding the return of the vehicle after she failed to comply with the undertakings in her e-mail. This, argues the Respondent, proves that she acquiesced to the dispossession of the motor vehicle but changed her mind as soon as she realised she could not comply with the offer. The Respondent attributes Applicant's inaction during the time she alleges to have been in hospital to have been an acquiescence/acceptance as well of the dispossession and allege she failed to attach any proof. It is the respondent who says that after she failed to comply with the arrangement she made, which in terms of the e-mail to make a first payment by 7 December, they traced the car and went to collect it. The dispossession could therefore

highly unlikely to have happened on 2 December but on 8 December 2015 as alleged by the Applicant.

[17] The fact that she made an offer does not make the Respondent's deprivation of her motor vehicle without recourse to the law not wrongful or mean that she acquiesced to the wrongful dispossession by the 1st Respondent. Conversely, resorting to self- help instead of the law, tracing and sending the men to go and dispossess the vehicle allegedly because of the failure by Applicant to negotiate payment or surrender the car is the sort of conduct that the remedy of *mandament* intends to discourage and avoid.

[18] Now since the Applicant in its papers also alluded to a transaction that happened between the two, the Respondent sought to prove that in terms of an agreement or an arrangement between the parties it was legally justified to dispossess the Applicant, since she agreed to surrender the motor vehicle. According to Innes CJ in *Nino Bonino v De Lange* 1906 TS 120, 'a term in a contract which authorises a party thereto, in given circumstances, to take possession without recourse to the courts, of property in possession of the other, is void.' He emphasised that by holding that

> "the court cannot recognise such a provision. It is an agreement which purports to allow one of the contracting parties to take the law into his own hands, to do that which the law says only the court shall do, that is, to dispossess one person and to put another person in possession of the property."

[19] In this matter it also became important that the Applicant approach the court by way of urgency even though the spoliation action is not a matter of urgency. The court did find the matter to be urgent as the Applicant showed that there was a threat of the motor vehicle being sold as the Respondent could not give the undertaking that was sought by the Applicant. This could only have been done because the Applicant was not willing to surrender the motor vehicle and instead of resorting to the law the Respondent resorted to self-help.

[21] Under the circumstances, I therefore make the following order:

> [21.1] The Respondent is directed to immediately return the motor vehicle

described as a 2014 Citrine Brown Mercedes Benz C200 bearing Registration Number […] to the Applicant;

[21.2] That should the Respondent fail to comply with the above order within (one) day of the granting of this order, then the sheriff of the Court be authorized to take the said motor vehicle from the Respondent or from whoever that it may be and wherever it may be found and forthwith return it to the Applicant.

[21.3] The Respondent is to pay the costs.

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N V KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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For the First Respondent: Adv J C VIUOEN

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