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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 23553/22

DATE: 31 October 2022

REPORTABLE: YES / NO

OF INTEREST TO OTHER JUDGES: YES / NO

REVISED

In the matter between:-

CLEODORAH PERTUNIA SCHALK

Applicant

V

LAZARUS SELAI MPHOSI

First Respondent

SOLOMON MPHOSI

Second Respondent

JUDGMENT

KOOVERJIE J

[1] The applicant seeks a final order ordering the respondents to restore and return certain vehicles in the respondents' possession.

[2] An interim order had already been granted in the urgent court on 10 June 2022. The relevant extract from the order reads:

2. *“The respondents are ordered to immediately return and/or restore the applicant’s possession of the following vehicles:*

2.1 *White GLE Mercedes Benz with registration number: [...]; and*

2.2 *The black V-Class Mercedes Benz with registration number: [...].*

3. *The order hereby made shall operate as a rule nisi and the respondents are called upon to advance reasons before the court on the return date of 28 July 2022 as obtained from the registrar, as to why the order shall not be made final ...”*

[3] The return date was extended to 24 October 2022, hence this hearing. This matter had become opposed and answering papers were filed. Counsel advised that he was only representing the first respondent.

[4] The first respondent will be referred to as “the respondent”, and Theo Mphosi will be referred to as “the deceased”. The two motor vehicles in issue will be referred to as the “GLE class” and “V Class” vehicles. The issue for determination is whether the applicant is entitled to the confirmation of her spoliation order.

[5] In her founding papers the applicant alleged that she has been in possession of the aforesaid vehicles since February 2020 and May 2021. The respondents had unlawfully deprived her of peaceful possession of the vehicles on 9 June 2022, by forcefully breaking into a storage facility where she stored the said motor vehicles. She further alleged that in all this time she was in possession of the keys to the said vehicles.¹

[6] The first respondent, on the other hand, alleged that when the deceased passed on, the said vehicles were at his residence in Polokwane. At no stage were the vehicles in the applicant's possession. During argument it came to light that only one of the vehicles was in Polokwane, namely the "V Class". The applicant submitted that she had requested her sister's assistance to remove the said motor vehicle from Polokwane.

[7] I have noted that in the respondent's papers it was alleged that the applicant removed both vehicles from the deceased's home in Polokwane around 20 May 2022. However, during the hearing the respondent only referred to the removal of the "V class" from Polokwane.

[8] It also came to light that the other vehicle, the "GLE class", was at all relevant times at her premises in Midstream.² To substantiate this fact, the applicant attached a vehicle tracking report (Annexure 'RA05') showing that the Mercedes Benz GLE was in Midstream and not in Polokwane.³ The applicant further annexed a payment notification from Capitec Bank, (Annexure 'RA07'). She submitted that although the owner is Rhineland Investments CC, she paid the deposit on the said vehicle.

[9] On the papers, each party claimed lawful entitlement to both vehicles. In respect of the Mercedes Benz GLE, the applicant further argued that it was a gift from the deceased to her in 2019. To illustrate this, she attached as Annexure 'RA08', photographs of the said vehicle and herself.

¹ Founding Affidavit par. 5.1 and 5.2, and par 6.1 page 002-9 to 14

² Replying Affidavit 6.1 to 6.2 page 020-9 to 020-10

³ Page 020-10 of the record

[10] She explained the vehicles was being stored as at the time she and the deceased were in the process of moving house. It was argued that the fact that she had both keys in her possession, in itself proves that she was in peaceful and undisturbed possession of the said vehicles. It was further argued that although she may not have personally placed the vehicles into storage, same were stored at her request.

[11] The respondent, at length, explained in his papers that the applicant had no right to any of the vehicles, since they were owned by Rhineland CC. On this basis alone, the applicant was not entitled to the vehicles.

[12] In his defence, the first respondent argued that the vehicles were not booked into the storage facility in the applicant's name but in the names of others. Furthermore there was a tampering with the tracking system of the motor vehicles. These factors objectively disprove any notion that the applicant was in peaceful and undisturbed possession of the vehicles.

[13] It is well established law that in seeking spoliation relief, all that is required is for the applicant to show that she was in peaceful and undisturbed possession of these vehicles. The issue as to whether or not she was in lawful possession or lawfully owned the vehicles is not a matter for determination. In this application the facts pertaining to ownership are irrelevant.⁴

[14] I am of the view that the applicant was in peaceful and undisturbed possession of the property. She further proved that she was unlawfully deprived of possession by the respondent. In this context "unlawful" means dispossession without the applicant's consent or due legal process.⁵

[15] It cannot be disputed that the vehicles were stored at the request of the applicant. The fact that the applicant requested her sister's assistance to remove the

⁴ Yeko v Qana 1973 (4) SA 735A

⁵ Sillo v Naude 1929 AD 21; George Municipality v Wiener and Another 1989 (2) SA 263 A

vehicle was not contended by the respondent. Furthermore it was not disputed that the applicant was in possession of both keys and did not consent to the removal of the said vehicles.

[16] In order to meet the first requirement, the applicant (the dispossessed party) need not show that she has a legal right to possess the property. The cause of the applicant's possession is irrelevant for the purposes of the spoliation remedy. It is likewise irrelevant whether the respondent has a stronger right or claim to possession, such as ownership. The *mandamus* protects only physical possession and not the right to possession.

[17] The second defence raised was that it would be impossible to return one of the vehicles as the deceased's wife was placed in possession thereof. I find this defence unassailable as on the respondent's own version, he alleged that he took possession of the vehicle and placed it in the deceased wife's custody.

[18] The further defence raised, in argument, was that members of the South African Police Service (SAPS) removed the vehicles. This explanation is flawed in my view. It is not disputed that the SAPS were present whilst the vehicles were removed. However, SAPS could have only lawfully seized the vehicles by virtue of their seizure powers in accordance with the relevant legislative prescripts. There is no evidence of this. Plainly, the vehicles were removed on the instructions of the respondents.

[19] I find that the dispossession was unlawful since the vehicles were removed without her consent and/or without a court order. The rationale behind this type of relief is that a person may not take the law into his or her own hands. Dispossession of property should be conducted lawfully.

[20] Hence it is not necessary to make a finding as to who has a greater right to the said motor vehicles. These issues can be resolved in the appropriate forum at the

appropriate time when the dispute as to ownership and/or lawful possession is ventilated. It need not be resolved in spoliation proceedings.⁶

[21] At this stage of the proceedings, the applicant is found to have been unlawfully dispossessed of the motor vehicles and the applicant is entitled to the confirmation of her spoliation order. As aptly stated in *Nino Bonino v De Lange* 1906 TS 120 at 122:

“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 to any inquiry or investigation into the merits of the dispute.”

[22] In the premises I make the following order:

1. The order granted by this court on 10 June 2022 is hereby confirmed.
2. The respondents are ordered to pay the costs of this application on a party and party scale.

H KOOVERJIE
JUDGE OF THE HIGH COURT

⁶ *Stocks Housing (Cape) (Pty) Ltd v The Chief Executive Director of the Department of Education and Culture Services* 1996 (4) SA 231 (C) at 240 B D

Appearances:

Counsel for the applicant:

Adv A Vorster

Instructed by:

Albert Hibbert Inc Attorneys

Counsel for the respondent:

Adv ME Manala

Instructed by:

Legodi Attorneys

Date heard:

24 October 2022

Date of Judgment:

31 October 2022