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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 8856/2021

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

TLOU KOKETSO MANTIKWE

APPLICANT

And

ABSA BANK LIMITED, MALL OF THE NORTH OFFICE **FIRST RESPONDENT**

MAISHA ANDRIES MOTLOUTSI

SECOND RESPONDENT

JUDGEMENT

KGANYAGO J

[1] On 5th June 2021 the applicant bought a Toyota Hiace vehicle from one Ntshengedzeni Steward Ndou. On payment of the purchase price, Mr Ndou gave the applicant what purported to be the original registration certificate of the vehicle. Based on the documents provided by Mr Ndou, the applicant registered the vehicle into his names and started operating it as a taxi. At the time of the purchase of the vehicle from Mr Ndou, the applicant was unaware that the vehicle was under an instalment sale agreement which was financed by the first respondent in favour of Mr Ndou. The applicant was also unaware that Mr Ndou had not yet settled his instalment sale agreement with the first respondent.

[2] The applicant alleges that on 23rd November 2021 whilst he was transporting his passengers who were on a special trip, he was stopped by the second respondent who told him that the vehicle was owing the first respondent and that it must be repossessed. When the applicant enquired from the second respondent whether he was having a court order authorizing him to repossess the vehicle, the second respondent told him that he was not working with court orders. The applicant told the second respondent how he came into possession of the vehicle, and that the vehicle was lawfully registered into his names, and also that he was having a certificate of registration as proof of ownership. On hearing that, the second respondent told the applicant that that did not apply to him. According to the applicant, he realized that he was not going to win the fight. The applicant then assisted his passengers to get alternative transport, and after that the second respondent took the vehicle.

- [3] On 25th November 2021 the applicant launched an urgent application seeking an order restoring possession of the vehicle. The application is being opposed by the first respondent on the basis that no spoliation took place, as the disposition was with the consent of the applicant. According to the first respondent, it had entered into an instalment sale agreement with Mr Ndou on 23rd December 2020. That Mr Ndou had breached the agreement in that he failed and/or neglected to make punctual payments of the monthly instalments. The first respondent alleges that Mr Ndou had sold the vehicle to the applicant using fraudulent documents as the documents that he had given to the applicant as original registration certificate of the vehicle refers to a Nissan Minibus. Further that Mr Ndou did not obtain permission from the first respondent before selling the vehicle to the applicant.
- [4] The first respondent alleges that the second respondent is a tracer whom they use his services to advise the defaulting consumers of their duty to communicate with the first respondent, and their rights in terms of the National Credit Act to surrender the vehicles voluntarily. That on 23rd November 2021 when the second respondent saw the vehicle, he approached the applicant and explained to him that he was a tracer acting on behalf of the first respondent. The applicant informed the second respondent how he had purchased the vehicle and that he had paid the full purchase price and was also in possession of a certificate of registration which he had left at home.
- [5] The second respondent explained to the applicant that Mr Ndou still owes the first respondent a substantial amount, and that it is likely that he had been defrauded. The second respondent urged the applicant to communicate with the first respondent in order to resolve the issue of ownership in an amicable

manner. That is when the applicant told the second respondent that he does not want to be involved in any fraudulent scheme, and he would rather settle the matter in an amicable manner.

[6] The applicant then asked the second respondent to first drop his passengers in Polokwane. The second respondent followed the applicant to Polokwane. From Polokwane they drove to Seshego where the applicant collected proof of purchase and the original certificate of registration of the vehicle. The applicant tried to call Mr Ndou, and when Mr Ndou was told the first respondent was there to repossess the vehicle, Mr Ndou disconnected the applicant and immediately blocked his number. The applicant asked the second respondent to accompany him to Bendor to make arrangements with his children for their collection by another individual as they would be waiting for his vehicle. From Bendor they drove to SMD where the applicant personally handed the keys of the vehicle to the security guard. An inspection of the vehicle was done, but the applicant refused to sign any documents on behalf of Mr Ndou.

[7] The second respondent suggested to the applicant that they go to the police station in Polokwane so that an affidavit can be deposed as proof that the first respondent was in possession of the vehicle. That at the police station the applicant did not indicate to the warrant officer that he was under threat of a criminal action or under duress of any form. According to the first respondent the applicant had voluntarily surrendered the vehicle, as the second respondent never drove the vehicle, but that it was the applicant who voluntarily drove the vehicle to SMD Polokwane and handed the keys to the security guard.

- [8] The first respondent had also brought a counterclaim seeking an order for the preservation of the vehicle pending the action which it intends to institute against Mr Ndou. The first respondent avers that the counter application is not raised as a defence to the applicant's spoliation application, but as a separate application to preserve the status quo, and that it should be considered after having considered the spoliation application.
- [9] The applicant in his replying affidavit denied that he had voluntarily handed the vehicle to the first respondent, but that it was dispossessed by the second respondent and his colleague without his consent. He had further stated that by not resisting he was being civilized, matured and a law abiding citizen and should not be equated to voluntary surrender of the vehicle.
- [10] The issue of urgency has been dealt with and the court has found that the applicant's application is urgent, and had enrolled it as such. It is trite that mandament van spolie is directed at restoring possession to a party which has been unlawfully dispossessed, irrespective of the possession. In *Ngqukumba v Minister of Safety and Security and Others*¹ Madlanga J said:
- “The essence of the mandament van spolie 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 in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due processes.”

¹ [2014] ZACC 14 (15 May 2014) at para 10

[11] The requisite for the grant of a spoliation order is that the despoiled person must prove that he was in possession of the object and that he was deprived of possession unlawfully. The first respondent has conceded that the applicant was in possession of the vehicle, but denies that he was wrongfully deprived of possession. According to the first respondent, the applicant had voluntarily renounced its possession. What this court must determine is whether the applicant was deprived of his possession unlawfully. In *Schubart Park Residents' Association v City of Tshwane*² 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 defences available to a spoliation claim, impossibility being one of them.

[12] The only defence raised by the first respondent is that the applicant had voluntarily given back possession of the vehicle. According to the first respondent, the applicant by indicating to the second respondent that if need be, he will make arrangements with the first respondent to pay arrears to enable him to retain the vehicle; the second respondent allowed the applicant to drop off his passengers whilst the second applicant was only following him; the applicant called Mr Ndou in the presence of the second respondent and informed Mr Ndou that he fooled him as the first respondent was claiming the vehicle back; by agreement between the applicant and second respondent they drove to Bendor, in Polokwane where the applicant made arrangements with his children for alternative transport; the applicant drove the vehicle to SMD Polokwane where he personally handed the keys to the security guard and accompanied the second respondent and Mr Bojang when the inspection

² 2013 (1) SA 323 (CC) at para 24

on the vehicle was done; accompanied the second respondent to Polokwane SAPS to depose the affidavit; and that at the police station, the applicant never indicated to the warrant officer that there was any form of threat, duress or fraud involved, suffice to state that these actions are tantamount to consent.

[13] Both counsel for the applicant and first respondent relying on *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services and Others*³ have correctly submitted that spoliation may take numerous unlawful ways which take the form of force, threat of force, stealth, deceit or threat. Further that in all cases spoliation is unlawful when the dispossession is without the consent of the person deprived of possession, since consent to the giving up of possession of property, if consent is genuine and freely given, negate the unlawfulness of the disposition.

[14] It is common cause that the applicant is the one who personally drove the vehicle to SMD Polokwane, being followed by the second respondent where he personally handed in the vehicle to the security guard in charge, and thereafter the vehicle was inspected, and that the applicant refused to sign any papers confirming that the vehicle has been surrendered. The question which this court must determine is whether the applicant had freely and genuinely given consent to the vehicle being repossessed. The second respondent in giving his version of the circumstances under which the applicant surrendered the vehicle, has stated that after the applicant had made alternative transport with his children at Bendor, the applicant drove the

³ 1996 (4) SA 231 (C) at 240B-C

vehicle to SMD Polokwane where he personally handed the keys to the security guard.

[15] SMD is the place where the first respondent stores the recovered properties for safe keeping. The second respondent being a tracer, will be the one to know about SMD and where it is situated. However, the first respondent does not explain as to who had suggested that the vehicle be taken to SMD and what was the reason for that. The applicant who seems to have been cooperating all of a sudden refuse to sign off the inspection report, whilst he is the one who allegedly voluntarily drove the vehicle to SMD. That raises some suspicions whether the applicant was willingly surrendering possession of the vehicle. There is no single document that the applicant had signed to proof that he had voluntarily handed the vehicle back to the first respondent. Even the affidavit signed at the police station confirming that the vehicle has been surrendered by the applicant was deposed and signed by the second respondent.

[16] The affidavit read as follows:

“I the undersigned Maisha Andries Motloutsi...

State under oath in English that:

Me and Hodi Mojapelo were on Aupr vehicle on 23 November 2021 on University Road – to R71 and we sighted a wanted car ABSA vehicle and TK Mantikwe ID...contact... was in possession of the asset unaware of the vehicle owing. Mr Mantikwe surrendered the vehicle [...] Toyota Quatum/Hiace vehicle was booked at SMD Polokwane store.”

[17] This affidavit does not state that the applicant had voluntarily surrendered the vehicle. The affidavit state that the applicant was unaware that the vehicle was owing. The version of the second respondent was that when he had

discussion with the applicant, he had informed the applicant that Mr Ndou still owes the first respondent a substantial amount, and it is likely that he had been defrauded. The second respondent furthermore informed the applicant that, if it appears that he was indeed in possession of such a certificate, that certificate has been fraudulently issued and the matter will have to be investigated by the South African Polices Services in due course. The second respondent was indirectly threatening the applicant with the police, which in turn will render the applicant to be vulnerable and also to be in a weaker bargaining power. The second respondent was in a position of authority and was using tactics which will render the applicant to ultimately handover the vehicle. Hence the applicant in his founding affidavit has stated that he realized that he will not win the fight. In my view, that was as a result the tactics that the second respondent had applied on the applicant which led the applicant to be vulnerable and weak, and ultimately acceding to the second respondent's demands.

[18] The requirements for undue influence were formulated in *Patel v Grobbelaar*⁴ 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 in order to induce consent to a transaction (a) which is to the detriment and (b) which he, with normal free will, would not have concluded.

[19] According to the applicant he had already paid Mr Ndou R310 000.00 in full. In my view the applicant would not have easily surrendered the vehicle

⁴ 1974 (1) SA 532 (A)

without a fight after having parted with such large sum of money. The only conclusion is that the second respondent had put threats of involving the police, and because of this threat, resulted in the applicant telling the second respondent that he did not want to be involved in any fraudulent scheme. In my view, even though the applicant is the one who had driven the vehicle to SMD Polokwane, that was not done voluntarily, and therefore the consent which he had given for the vehicle to be repossessed was not free and genuine. It was to his detriment to simply not fight for the purchase price he had paid Mr Ndou a few months ago. That is also an indication that the consent was not done with a free will. It follows that the applicant has satisfied the second requirement for the grant of a spoliation order. The applicant is therefore entitled to the relief he is seeking in his notice of motion.

[20] In the result I make the following order:

- 20.1 The application is heard as one of urgency in terms of Rule 6(12) condoning non – compliance with time limits for service of court documents.
- 20.2 The respondents are ordered to restore physical possession of motor vehicle to wit a Toyota Hiace bearing register number [...] and Vin AHTSS22P107117878 as well as register number plate [...] to the applicant, Tlou Koketso Mantikwe, with immediate effect.
- 20.3 In the event the respondents failed or refused to comply with the order in 20.2 above, the Sheriff of this honourable court is authorized and directed to enforce the aforesaid order by removing the aforesaid motor vehicle bearing vehicle register number [...] referred to in order 20.2 above from the unlawful possession of the said respondents or from wherever the said motor vehicle

may be found, and there and then restore the applicant's possession thereof by handing over the said motor vehicle where may be found.

20.4 The first respondent to pay the applicant's costs on party and party scale.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the applicant	: Adv S Sikhwari
Instructed by	: Kovani Machete Attorneys
Counsel for the respondents	: Adv M Bresler
Instructed by	: Jay Mothobi INC
Date heard	: 21st December 2021
Date delivered	: 23rd December 2021