Court File

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 21186/2008

DATE: 24 DECEMBER 2008

In the matter between:

SAMUEL CHARLES MYBURGH APPLICANT

and

ANTON EN JOHAN VERVOER BK 1ST RESPONDENT

CARL ABRAHAM ETZEBETH 2ND RESPONDENT

JUDGMENT

DAVIS, J

This is an application for a *mandament van spolie* which was launched yesterday that is 23 December 2008, as a matter of urgency before me. Attached to a very poorly drafted set of documents was an affidavit deposed to by one Samuel Charles Myburgh, who appears to be the applicant in this matter, in which he sets out certain facts to justify the application for the *mandament*. Correctly Mr Liddle, who appeared then on behalf of the respondent pointed out that no opportunity had been granted to his clients to depose to an answering affidavit and furthermore

that the matter wasn't as urgent as has been urged upon me by applicant in that even on applicant's own version the vehicle was taken away by respondents on 16 December 2008 and a week went by before the application was launched as a matter of urgency.

I pointed out to Mr Liddle at the time that I did regard a spoliation application as urgent, in these circumstances, but postponed the matter to give respondents an opportunity to depose to an answering affidavit which was prepared and submitted to me this morning, that is 24 December 2008.

Briefly it appears to the extent that the facts are common cause that the following occurred.

The applicant sought to purchase a vehicle from first respondent, on 12 December 2007. The vehicle was not registered in his name, due to the involvement of ABSA, it appears that some form of credit agreement was used in order to finance the transaction. It appears that for a long period of time, since 12 December 2007 first respondent has been battling to obtain payment pursuant to the contract that was entered into and that according to respondent's version applicant has been tardy in the extreme,

evasive, and allegedly dishonest in not complying with the terms of the contract to which I have made reference.

Mr Liddle also referred me to a document of 12 December in which the following appears;

> "Twee premies van R10 000 ... is betaalbaar op 15 Januarie 2008 en 15 Februarie 2008. Die balans daar uitstaande is dan op 10 April 2008 ten volle betaalbaar. Indien betalings nie op datum geskied sal alle betaling reeds ontvang verbeur word deur bogenoemde en as huurgeld beskou word."

Accordingly Mr Liddle submitted that the document to which I have made reference, generated 12 December 2007, converted the sale agreement into a lease agreement if the condition of payment was not fulfilled and implicit in the lease agreement with a hypothec which would entitle the first respondent to obtain possession of the vehicle as security for the lease payments.

Applicant's case by contrast is a simple one. Applicant says I am the *bona fide* possessor of the vehicle. On 16 December 2008 the vehicle was taken without the permission of my son, who at that

point was in control of the vehicle, there was no legal proceeding which justified the taking of the vehicle, the first respondent has therefore acted on its own in so dispossessing me of my vehicle and accordingly I am entitled to the relief so sought.

The relief sought requires simply the following;

The applicant must prove on a balance of probabilities that he or she was in peaceful and undisturbed possession of the property and that he or she was deprived unlawfully of possession. Mr Liddle made much of the fact that the possessor in this case claimed to be a *bona fide* possessor and that somehow the requirement of *bona fide* possession was integral to the relief, so much is also foreshadowed in the answering affidavit.

It is however clear that depravation of possession takes place irrespective of whether the possessor is *bona fide* or not. Indeed it is not a defence against an application for spoliatory relief that the applicant's possession was based on theft or robbery. See in this connection Wille's Principles of South African Law (9th Edition) at 262. Possession *per se* is sufficient to meet the first leg of the test. Indeed as the learned authors of Wille's state;

> "The *mandament van spolie* is available to any despoiled person who exercised physical control with the intention of deriving some benefit there from, eg a thief, a squatter, a *bona fide* possessor, a trustee, a pledge, a precarsed, a lessee, a depository, a hire purchaser, a borrower, a building contractor or an agent".

Insofar as the spoliatory action extending to a possessor who derive possession through theft, see Voet 41.23.16 and 43.16.3. Accordingly in this particular case it is clear that the two requirements have been met by the applicant.

Mr Liddle referred me however to a recent judgment of the Supreme Court of Appeal of Cameron, JA in Streetpole Ads Durban (Pty) Ltd University of KwaZulu Natal v Ethekwini Municipality (case 06/2007). In particular Mr Liddle referred me to the following passage in the judgment;

> "This argument invokes the principle that a defending respondent in a spoliation action is generally not allowed to contest the spoliated applicant's title to the property. That is because good title is irrelevant: the claim to despoliatory

> relief arises solely from an unprocedural depravation and possession. There is a qualification however if the applicant goes further and claims a substantive right to possession whether based on title of ownership on contract. 'In that case respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims.' This is because such an applicant 'in effect forces an investigation of issues relevant to the further relief he claims. Once he does this respondent's defence in regard thereto has to be considered." (at para 15).

In that case, that is the case of Streetpole Ads, it appeared that the applicant sourced part of its relief in contractual agreement which it claimed gave it a right. It was this allegation about a right which was the subject of the dicta of Cameron, JA to which I have already made reference.

In the present case all that's before me is the somewhat crude averment of applicant "ek is die *bona fide* besitter van 'n 1999 model MAN voorhaker ..." To the extent that the question of title

is relevant to the relief sought in Streetpole Ads that issue is clearly not in existence in this case and therefore the qualification made by Cameron, JA, correct and as binding as it is on me is not relevant to the present dispute.

That then leaves a further issue. The further issue is that as applicant on respondent's version has no legal entitlement to the vehicle at all this Court should adopt a pragmatic approach and accordingly leave the vehicle in the possession of the respondent, pending resolution of the dispute. That is of course the course of action that was open to the respondent in the first place. It could have come to Court on an urgent basis, seeking relief that it hold the vehicle pending applicant's compliance with contractual arrangements, which it, respondent, avers applicant has specialised in avoiding over a period of a year, but it did not do so, and in essence the *mandament van spolie* does have two aspects to it which are relevant to the present dispute. Whether the central aim of this relief is to preserve general legal order, or to preserve legal order through restoration of the possessory relationship between a person and a particular property that has been disturbed by (indistinct) the fact is that the *mandament* exists in order to prevent a party from taking the law into his or her own hands, and harsh as this may be, particularly when the possessor may be a thief or a squatter, that remains the law of

this country and legal avenues are open to a party such as respondents notwithstanding.

The second question relates to the issue of urgency. By its nature this kind of relief is urgent, because courts wish to prevent a party form taking any advantage from its exercise of self help as occurred in this case. What course of action the respondents wish to take is of course an issue upon which I do not have to decide. Suffice it to say that legal remedies do exist and it is those legal avenues that should have been explored rather than in fact invoking self help. Whether in fact there is a lease and a hypothec is significantly open to doubt on the basis of this one letter put before me as part of the answering papers. It is certainly not enough to justify the action that was taken by respondents to dispossess the applicant.

For these reasons therefore the APPLICATION SUCCEEDS, THE RESPONDENTS ARE ORDERED TO RETURN BY 08H00 ON SATURDAY 27 DECEMBER 2008 THE VEHICLE WITH THE REGISTRATION NUMBER CA388784 AND THE VIN NUMBER AAMT810465PX05247 (the vehicle) to the applicant, or failing there with the Sheriff is authorised to remove the vehicle from possession of the respondents and place applicants in possession of the vehicle. Respondent is ordered to pay the costs of this application.

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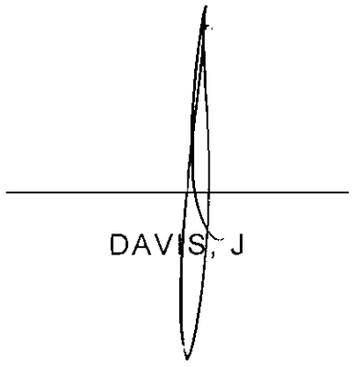

DAVIS, J

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