IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE
Case number: 4170/2022

In the matter between:

GARRETH ANVER PRINCE **Applicant**

and

MFC, A DIVISION OF NEDBANK **First respondent**
M A SLINGERS **Second respondent**

JUDGMENT DELIVERED ON 5 MAY 2022

VAN ZYL AJ:

Introduction

1. This application came before the Court as an urgent matter set down for 22 April 2022.

2. The applicant seeks a spoliation order against the first respondent ("MFC") directing it to restore possession to the applicant of a vehicle described as a 2013 Ford Ranger with engine number [....], and bearing registration number [....].

3. The applicant also asks that MFC be held in contempt of court in the event that it refuses to restore possession of the vehicle to the applicant. Lastly, the applicant asks that, in the event that MFC fails to restore possession of the vehicle to the applicant, the South African Police Service or the Sheriff of this Court to be authorised to do what is necessary to restore such possession.

4. The current application is a sequel to two earlier applications brought in relation to the vehicle: On 22 March 2022 under case number 7718/2022 (the Honourable Justice Binns-Ward presiding), the applicant obtained an order on an urgent and effectively *ex parte* basis against Ms Slingers (the second respondent in the current application) directing her to restore the applicant's possession of the vehicle. MFC was cited as second respondent in that application, but no relief was granted against it.

5. Subsequently, on 31 March 2022 under case number 8239/2022 and before the Honourable Justice Kusevitsky, the applicant obtained another order on an urgent basis, again against Ms Slingers as first respondent, MFC as second respondent, and a debt-collecting firm styled Kitshoff and Associates as third respondent, in which contempt relief sought against the first respondent was dismissed, and further spoliation relief sought against MFC and the third respondent was postponed to the 3rd of August 2022 to be heard on the semi urgent roll.

6. That relief was granted because it appeared on that day, that is, 31 March 2022, that MFC was in fact in possession of the vehicle and not Ms Slingers. MCF wished to oppose the spoliation order sought against it, but had received very short notice of the application and could not prepare opposing papers in time for the hearing. In terms of the court order, MFC was to retain possession of the vehicle pending the determination of the postponed application.

7. The applicant, dissatisfied with having to wait for the spoliation relief to be dealt with on 3 August 2022, approached the Judge President and obtained permission for the matter to be set down on the urgent roll on 22 April 2022. It appears therefore that it is the second part of the order granted on 31 March 2022 that is currently before me. The issue is confused somewhat by the fact that the

notice of motion and founding papers serving before me (apart from bearing a new case number) contain prayers and submissions in support of additional relief not sought under case number 8239/2022. I debated this with counsel for MFC and with the applicant at the hearing of this application. Counsel for MFC was of the view that the 31 March 2020 order stands, and that therefore the relief sought under case number 8239/2022 would still have to be addressed on 3 August 2022 despite the institution of the current application.

8. Despite the confusion, I tend to agree with the applicant that what the Judge President allowed the applicant to do in setting the matter down on the urgent roll on 22 April 2022, was to bring forward the argument that had been set down for hearing on 3 August 2022. In other words, I am to determine the application that was postponed to 3 August 2022. Upon the grant of an order in the present application (under case number 4170/2022) there would be no need for the matter to be dealt with at any future stage and the order granted on 31 March 2022 in relation to the postponed relief will effectively fall away.

9. In the circumstances, I have to decide whether a spoliation order is to be granted against MFC in relation to its possession of the vehicle. The new relief included in the notice of motion relates to whether MFC should be held in contempt of court should they refuse to restore position of the vehicle to the applicant. In the founding affidadvit and in argument the nature of this relief was changed in that the applicant submitted that MFC was already in contempt of court as a result of its failure to return the vehicle to the applicant. I shall discuss the basis for this submission below.

10. When the matter served before me I had the founding papers and an answering affidavit on file. The applicant delivered, three days after the hearing, a replying affidavit to my chambers out of the blue. I do not know whether MFC has had sight of this affidavit and there is no application for condonation of the late delivery threof. I have accordingly not taken the contents of that affidavit into account in determining this application.

Background

11. The background to this matter is set out in the answering affidavit delivered by MFC.

12. MFC concluded an instalment sale agreement with Ms Slingers in respect of the vehicle some time ago. She made the initial payment and a few subsequent payments under the agreement. On 15 June 2021, MFC notified Ms Slingers that her account was in arrears. She promised that payment would be made. This, however, did not occur until 3 September 2021, at which time only a small portion of the arrears was paid.

13. At the time, the whereabouts of Ms Slingers and the vehicle were unknown. MFC then instructed a so-called external debt collector who traced Ms Slingers to her mother's home in Belhar. In conversation with Ms Slingers, the debt collector learnt that Ms Slingers had bought the vehicle for her cousin. Her cousin had subsequently handed the vehicle to a third party, presumedly the applicant.

14. MFC's mandate to the external debt collector to locate the vehicle expired, and a second external debt collector, Kitshoff and Associates, was appointed to try to find the vehicle. On 4 January 2022, the second debt collector made contact with Ms Slingers and with the applicant. They were, on MFC's version, not co-operative (this is denied by the applicant, but does not take matters much further).

15. On 11 March 2022 a third external debt collector was mandated to attend to the collection of the vehicle. This debt collector made contact with Ms Slingers who advised that the vehicle was in the possession of the applicant. The debt collector then contacted the applicant to enquire about the whereabouts of the vehicle. According to the debt collector the applicant informed him that the vehicle was not in his, that is, the applicant's, possession at the time. The applicant denies that he stated this but, as it is common cause that MFC came into possession of the vehicle from the police impound as set out below, nothing turns on what the applicant had or had not said to the debt collector.

16. On 18 March 2022 a certain Mr Denver (who is unknown to MFC) contacted

the third external debt collector and advised that he had spotted the vehicle at the Bellville South African National Police impound. How the vehicle came to be impounded is not clear on the papers. MFC does not know, and the applicant speculates that Ms Slingers herself took it there to get rid of it. It might have been stolen and retrieved by the police. Ms Slingers has not opposed any of the applications brought by the applicant, and her version is therefore not before the Court.

17. The police impound required proof from MFC that it was the title holder to the vehicle. Upon receipt of this information the external debt collector made contact with Ms Slingers to sign a voluntary surrender agreement in relation to the vehicle. She signed the voluntary surrender agreement on 25 March 2022.

18. The vehicle was thereafter released to the third external debt collector who in turn handed it over to MFC. It is currently stored in MFC's storage unit.

19. On 30 March 2022, MFC was notified by the second external debt collector that the applicant was about to bring an urgent application under case number 8239/2022 on 31 March 2022 against MFC and Ms Slingers. MFC states that it was only on that day that it became aware of the spoliation proceedings previously insituted and the spoliation order granted against Ms Slingers under case number 7718/2022 on 22 March 2022. That was because that order was attached to the urgent application to be heard on 31 March 2022. Whether MFC was aware of the order earlier as the applicant contends will be dealt with below.

20. MFC briefed counsel to attend the hearing on 31 March 2022. That hearing resulted in the order by Justice Kusevitsky to which I have referred earlier. Notably, notwithstanding the fact that the court on that day had sight of the spoliation order granted against Ms Slingers on 22 March 2022, it ordered that the vehicle should remain in the possession of MFC, who undertook to retain it and not to dispose of it pending the finalisation of the application.

Should MFC be ordered to return the vehicle to the applicant?

21. As mentioned earlier, MFC avers that it was not aware of the spoliation order granted on 22 March 2022 when it took possession of the vehicle. It only became aware of that order on 30 March 2022, when it was informed of the urgent application to be heard the next day before the Honourable Justice Kusevitsky. It therefore in good faith advised the court on 31 March 2022 of its lawful possession of the vehicle due to the voluntary surrender agreement provided by Ms Slingers.

22. MFC submits that it is not currently in unlawful possession of the vehicle for the following reasons:

22.1 The order granted on 31 March 2022 under case number 8239/2022 specifically states that MFC must remain in possession of the vehicle pending the finalisation of the application.

22.2 MFC did not spoliate the applicant as it was not aware of the spoliation order granted on 22 March 2022 under case number 7718/2022 when it took possession of the vehicle from the police impound.

22.3 The applicant has not met the requirements for a case of spoliation against MFC, because the latter did not deprive the applicant of possession of the vehicle forcibly or wrongfully against his will or without his consent.

23. The applicant argues that MFC is a co-spoliator because it knew of the order granted against Ms Slingers on 22 March 2022, and yet proceeded to take possession of the vehicle after she had signed the voluntary surrender agreement and in the face of the 22 March 2022 order. The applicant argues that he had given notice of the order to MFC.

24. As regards notice of the spoliation order granted on 22 March 2022, and whether MFC was aware of that order, there are a few significant points to have regard to.

25. The first is that the order did not apply to MFC. It applied to Ms Slingers. No relief had been granted against MFC. The order was drafted in such a way that the

heading thereto reflects the following: It names the applicant and states in relation to the "*Respondent*" (in the singular) "*M A Slingers + two others*". MFC's name does not appear anywhere in or on the order as granted.

26. The applicant says that he emailed a copy of the order to the email address indicated on MFC's website, namely care@mfc.co.za. He did that on 23 March 2022. From the record it is clear that he did not addess any message to MFC in the email, but simply attached photographs of the order. The subject line reads: "*Photo from Ganja Prince*". No details as to the attachment are provided, and there is no explanation as to the purpose and import of the email. What MFC received, therefore, was a photograph of a document that did not bear its name. No context or explanation was provided at all.

27. The applicant attaches to his founding affidavit an email response from MFC's multimedia contact centre, which reads as follows:

> *"Dear Gareth Prince*
> *Thank you for your email.*
> *Please advise how MFC can assist you by replying to this email or calling us on 086 087 9900 with more details.*
> *To get a settlement amount, SMS the letter 'S' and your identity number to 31795 or email the letter 'S' and your identity number to selfservice@mfc.co.za.*
> *If you have any questions, send an email to care@mfc.co.za or a fax to 0860 035 466.*
> *NB: Did you know you can now manage your account online? Simply register register on www.mfc.co.za and get settlements, border letters and statements.*
> *Kind regards*
> *..etc.*"

28. It is clear that this is an automatic response generated to advise persons wishing to communicate with MFC as regards the channels available to do so. The applicant did not pursue any of those channels with details of what he was

communicating, why he was doing so, and to whom. The response email is not proof, as the applicant submits, that any person within MFC responsible for the administration of credit agreements such as the one concluded by Ms Slingers obtained notice of the order. This is especially so as the order does not indicate that MFC was cited as a party. Insofar as there is a dispute on the papers as regards this issue, I must accept MFC's version (*Plascon Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C).

29. The fact that Ms Slingers signed the voluntary surrender agreement on 25 March 2022 possibly in breach of the 22 March 2022 order does not lead to the conclusion that, for that reason, MFC knew about the order. There is no indication that Ms Slingers informed MFC of the order. It is, in fact, not clear from the papers whether Ms Slingers herself was aware of the 22 March 2022 order by the time she signed the voluntary surrender agreement. The applicant attaches to his founding affidavit photographs of the order having been sent to Ms Slingers via WhatsApp but I cannot see from the papers filed of record whether the messages had in fact been read.

30. The applicant relies, for his argument that MFC is a "co-spoliator", on the case of *Jamieson and another v Loderf and another (Pty) Ltd and Others* (A595/2011) [2015] ZAWCHC 18 (20 February 2015) in which the following was stated by a Full Bench of this Court, having discussed the various approaches to whether a spoliation order can be granted against a third party (like MFC) who has taken possession of the relevant property from the spoliator (Ms Slingers):

> *"[51] It is unnecessary to determine which of the varying approaches is correct. Although some cases in the* Jivan *line make reference to the* bona fides *of the spoliator, the emphasis on my reading falls on the third party's knowledge. If the third party had notice of the spoliation when taking possession, there is much to be said for the view that spoliation relief should be granted, not because the third party is a spoliator but because he had notice of the spoliation when taking possession. This outcome could well be justified on the basis of the doctrine of notice, an equitable doctrine which in a living system of law can in appropriate circumstances be extended to*

situations not already clearly covered by it, having regard to considerations of fairness and legal policy." (Emphasis added.)

31. The *Jivan* line referred to in the quote are cases in respect of which the Court in *Jamieson* remarked in para [47]: "*The position here is that the sales and transfers occurred after the institution of the spoliation application. There are cases dealing with the situation where the spoliator parted with possession before institution of the spoliation application. There is a line of authority holding that in such circumstances the remedy of spoliation is not available where possession has passed in good faith to an innocent third party ... I shall refer to this as the Jivan line."*

32. In the present matter, MFC took possession of the vehicle after the institution of spoliation proceedings. *Jamieson* states the following in this regard:

> "*[54] Mr Studti submitted that the* Jivan *line was distinguishable because those cases dealt with transfers of possession which occurred prior to the institution of the spoliation proceedings, whereas in the present case the transfers of possession occurred while an appeal was pending. I do not think this makes a difference in principle. The reasoning in the cases was based on the essential nature of a spoliation order, namely the restoration of possession. The spoliator ordinarily cannot restore possession if he does not have it. This reasoning applies whether the transfer of possession occurred before or after the institution of the spoliation proceedings. The fact that the transfer of possession occurred after the institution of spoliation proceedings may be relevant in assessing whether or not the third party acquired possession innocently but is not decisive*." (Emphasis added.)

33. In *Jamieson* the Court concluded on the facts before it that the third parties in question could not be ordered to return the property: "*[52] Be that as it may, it is common cause in the present case that the new owners did not know of the spoliation or of the pending proceedings when they purchased or when they took transfer. On the* Jivan *line, therefore, no spoliation order is now possible*." (Emphasis added.)

34. On the papers at my disposal, I am not able to find that MFC had had notice of the spoliation order granted against Ms Slingers on 22 March 2022 when it took possession of the vehicle on 25 March 2022, or of the proceedings instituted to obtain such order. It only acquired such notice on 30 March 2022. On the authority of *Jamieson*, therefore, an order cannot be granted against MFC for the return of the vehicle to the applicant.

35. MFC, moreover, took possession of the vehicle not from Ms Slingers (albeit that she had formally surrendered the vehicle by signing the surrender agreement) because she did not have it in her possession or under her control at the time. It had been used by the applicant prior to it being impounded (for reasons unknown) and MFC obtained possession from the police via the external debt collector who collected it from the impound.

36. In these circumstances, there is no basis for an order directing MFC to return the vehicle to the applicant, whether (with reference to the distinction made in *Jamieson*) as "co-spoliator" or as third party with notice of the previously instituted spoliation proceedings or subsequent order.

Is MFC in contempt of court?

37. It follows from the finding that MFC had no knowledge of the order granted on 22 March 2022 when it took possession of the vehicle from the police impound (via the external debt collector) that it cannot be held in contempt of court for refusing to hand the vehicle the applicant.

38. The common law test for whether disobedience of a civil order constitutes contempt is that an order must exist, the order must have been duly served on the contemnor, there must have been non-compliance, and the non-compliance must have been deliberate and *mala fide*. The onus lies on the applicant to prove beyond a reasonable doubt that all these elements are present (see *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)).

39. On the facts of this matter as they appear from the affidavits filed of record,

there is not proof beyond a reasonable doubt that MFC had notice of the order granted against Ms Slingers. It did not act in defiance – deliberately and in bad faith - of the order when it took possession of the vehicle. As from 31 March 2022 it has been in possession of the vehicle in terms of the order granted by Justice Kusevitsky. It is not in contempt of the 22 March 2022 order.

Costs

40. MFC is the successful party in the litigation and I can see no reason for deviating from the general principle that costs follow the result.

41. MFC sought costs on an attorney and client scale but I am not inclined to grant a punitive order. Punitive costs orders should generally be reserved for litigants who are guilty of dishonesty or fraud or some other conduct which is to be frowned upon by the Court: "*The scale of attorney and client is an extra-ordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium*" (*Plastic Converters Association of South Africa (PCASA) Obo Members v National Union of Metalworkers Union of South Africa and Others* (JA112/14) [2016] ZALAC 37 (6 July 2016) at para [46]).

42. The applicant was misguided in persisting with seeking the relief he did against MFC, but I do not think that his conduct was such as to warrant costs on a punitive scale.

Order

43. In all of these circumstances, I make the following order:

> **The application is dismissed, with costs on the scale as between party and party, including any costs that stood over from 31 March 2022**.

P. S. VAN ZYL
Acting judge of the High Court

HEARING DATE: 22 April 2022

Appearances:

The applicant:	In Person
For the first respondent:	C. Francis, instructed by STBB Smith Tabata Buchanan Boyes