

SOUTH AFRICA / JUDGMENT

Buffalo City Metropolitan Municipality and Others v East London Motor Vehicle Street Traders Association (CA348/2013) [2015] ZAECHGHC 66 (25 June 2015)

[2015] ZAECHGHC 66

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket, I Schoeman

CASE / FILE NUMBER

CA348/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: CA348/2013

DATE

HEARD: 19/06/2015

DATE

DELIVERED: 25/06/15

NOT

REPORTABLE

In

the matter between:

BUFFALO
CITY
METROPOLITAN MUNICIPALITY
1ST
APPELLANT
MINISTER
OF POLICE
2ND APPELLANT
WARRANT
OFFICER
MUNDELL
3RD
APPELLANT
and
EAST
LONDON MOTOR VEHICLE
STREET
RESPONDENT
TRADERS
ASSOCIATION

JUDGMENT

PLASKET J

[1] The rule of law is one of the founding values of our Constitution.[1] It is, most often, invoked against the State when it is alleged to have acted unlawfully or irrationally in the exercise of the public power vested in it.[2] But the rule of law also applies to private individuals in the sense that everyone, whether a prince or a pauper, is equally subject to the law, and is required to comply with it.[3] This case concerns a cynical disregard of the law by members of the respondent, the East London Motor Vehicle Street Traders Association

(the Association), a voluntary association that sells second hand cars, and an attempt to have their contempt for the law of the land protected by the courts. That attempt succeeded in the court below, the East London Magistrate's Court, when a spoliation order in favour of the Association and an interdict were issued, hence this appeal brought by the Buffalo City Metropolitan Municipality (the Metro), the Minister of Police (the Minister) and one of his policemen, Warrant Officer Edward Mundell (Mundell).

[2] The issues that arise for determination in this appeal are whether the Association possessed what is described in its notice of motion as 'the public space near Buffalo City Public FET College' where some of its members sometimes parked cars in order to sell them, and whether, if it did, it was dispossessed by any of the appellants. We are also required to decide, apart from the costs of the appeal itself, whether the Association should pay the wasted costs when this appeal was removed from the roll on 13 February 2015. But first it is necessary to set out the facts.

The

facts

- [3] To the extent that there are disputes of fact on the papers, the facts upon which the matter must be determined are, of course, those facts put up by the applicant – the Association, in this instance – that have either been admitted or have not been denied, and the facts put up by the respondents – the Metro, the Minister and Mundell.[4] In this matter there is no suggestion that any of the denials by the Metro, the Minister or Mundell of factual averments made by the Association are either uncreditworthy or untenable and so can be rejected on the papers.
- [4] Members of the Association, according to the founding affidavit of Mr Mputumi Sondaba, conduct the ‘business of street trading’ as defined in the Metro’s By-law on Street Trading[5] by selling second-hand cars. They do so by parking the cars in parking places on a public road or public place, by placing printed sheets containing details of each car on its window and by actively marketing the cars to passers-by. In this way, according to Mr Andile Fani, the Municipal Manager of the Metro and the deponent to its answering affidavit, they created a market place for second hand cars in a public place. He described the public place mentioned in the notice of motion as the area ‘bounded on its western side by Union Avenue, on its northern side by Lukin Road, on its eastern side by the East London FET College and on its southern side by public open space’ on which is situated, in the centre of this area, the War Memorial, a national monument.
- [5] It is common cause that none of the members of the Association who engaged in street trading had a valid trading permit.[6] It is also clear that none of them was registered as a dealer in terms of the Second-Hand Goods Act 6 of 2009.[7] Their conduct was thus in violation of the law. Various meetings took place between members of the Association, officials of the Metro and the police at which the legal position was made clear to them. They were thus aware that their conduct was unlawful. Despite this, they continued their activities unabated. They simply ignored requests from officials of the Metro to desist.
- [6] At this point, the Association instructed attorneys. This did not help matters. Prior to the engagement of attorneys, members of the Association accepted that their conduct was in violation of both the By-law on Street Trading and the Second-Hand Goods Act. Their attorneys advised them, however, that this was not so: through a process of convoluted reasoning that does not withstand scrutiny,

they advised their clients and asserted to the Metro that the selling of second-hand cars in a public place by their clients who were neither in possession of trading permits nor registered as second-hand dealers contravened neither the By-law nor the Act.

Fortified and emboldened by this patently incorrect advice, members of the Association continued with their illegal conduct.[8]

[7] It is alleged by the Association that on 26 March 2013 employees of the Metro and the Minister took action against its members. This is how it detailed the events of that day in its founding affidavit:

'23. On the 26th of March 2013, we were approached by the employees of both the First and the Second Respondent who advised us to remove our vehicles from the public space that we are occupying. A letter was written to them by our attorney advising them that their actions are unlawful and that should they persist with same an application for mandament van spolie will be brought...

24. The response that our attorney received on the 26th of March 2013 was to the effect that should we continue to trade on any public road contrary to the legislation we will render ourselves liable for prosecution...'

These allegations were admitted by the Metro and, for all intents and purposes, by Mundell as well.

[8] Then the deponent to the founding affidavit proceeded to say:

'We have been in peaceful and undisturbed occupation of the said public space since then until this morning [15 April 2013 when the affidavit was signed] when the Third Respondent together with the members of the First and the Second Respondent approached us and impounded our vehicles and gave some of our members traffic tickets and ordered us to vacate the said public area.'

[9] Fani denied that the Metro impounded any vehicles as alleged but he stated that the Metro was 'well within its rights in warning parties who were conducting illegal street trading in second-hand motor vehicles to remove them, on pain of impoundment'.

Mundell, who was present, stated that on 15 April 2013 he had issued members of the Association with J534 notices – summonses to appear in court with the option of paying an admission of guilt fine – for contraventions of the Second-Hand Goods Act. He denied that any of the Association's members' cars had been impounded and that he ordered anyone to vacate the area.

[10] It is made clear in the Association's affidavit made in reply to Mundell's answering affidavit that the act of dispossession that it relies on is an 'order' given by Mundell and his colleague 'and the members of the First Respondent' to members of the Association 'to cease their business as same amounted to an illegal activity'. The affidavit continues:

'This is the dispossession that is being challenged by the Applicant. Until such time as the Applicant's members have been found guilty by a court of law, the Respondents are not allowed to unlawfully despoil or disturb their peaceful possession of the land concerned.'

The proceedings in the court below

[11] The Association launched an urgent ex parte application on 15 April 2013 in the East London Magistrate's Court. A rule nisi was issued calling upon the respondents to show cause on the return day why a final order should not be granted in the following

terms:

'2.1 That the Respondents' action depriving the Applicant of the peaceful and undisturbed occupation of the public space near Buffalo City Public FET College be and is hereby declared unlawful and be set aside;

2.2 That the First and the Second Respondent or the Third Respondent and/or any person acting under direct or indirect control or authority of the First and/or the Second Respondent be and is hereby directed to restore possession of the public space near Buffalo City Public FET College to the Applicant; and

2.3 That the First and/or the Second Respondent or any person acting under direct or indirect control or authority of the First and/or the Second Respondent be and is hereby interdicted and restrained from unlawfully interfering with Applicant's possession or occupation of the said public space near Buffalo City Public FET College.'

Paragraphs 2.1 and 2.3 were ordered to operate as interim interdicts with immediate effect. On 14 June 2013, a final order was granted in favour of the Association.

[12] In his judgment, the magistrate recorded the following facts that he found to have been proved: (a) that the Association was 'in de facto possession of the said public space'; (b) that members of the Association were approached by employees of the First Respondent together with the Third Respondent all acting in the course and within the scope of their employment ...';

(c) that '[t]raffic tickets (written notices to appear in court) were given to some of the members of the Applicant'; and

(d) that the Association 'was deprived of such possession' because '[a]side from the virtual admission of same, this is a logical inference from the totality of evidence presented'.

[13] He then dealt with the defence raised by the Metro that whatever dispossession may have occurred was lawful on account of the

provisions of ss 7(1) and (3) of the By-law on Street Trading.

[14] Section 7(1) empowers an authorised official of the Metro to remove or impound property of a street trader where, for instance, the official reasonably suspects that the property is used in connection with 'unauthorised or illegal street trading'. Section 7(3) provides that when a person has been ordered to remove property in terms of s 7(1) and has not done so, 'any authorised official of the municipality may take such steps as may be necessary to remove such property'.

[15] The magistrate found that s 7 did not apply on the following reasoning:

‘This court interpreted the above as follows and made a finding that the applicant is not a street trader as defined in terms of the provisions of the said by-law. Section 7 applies to a “street trader” (my emphasis). To become a “street trader” in terms of the by-law that “person” in terms of Section 2, has to obtain a valid trading permit.’

[16] It appears from this that the magistrate reasoned that precisely because members of the Association were street trading without a trading permit, they were not street traders. Section 7 only applied to people who were street trading with valid permits. He proceeded to hold that, while the Metro’s officials did not remove or impound any cars, they ordered members of the Association to remove their cars, and that amounted to a dispossession.

The

issues

[17] This appeal can be disposed of on the basis of either of two fundamental questions, namely whether the Association possessed the ‘public space near Buffalo City Public FET College’ and, if it did, whether some of its members were dispossessed of it on 15 April 2013.

Was the Association in possession?

[18] Very little is disclosed in the papers about the Association. The founding affidavit does not say how many members it has and, from the minutes of meetings attached to the papers and the resolution authorising Sondaba to launch the proceedings, it appears that it only had a handful of members, perhaps no more than six.

[19] The area that the Association claimed to have possessed is relatively large. The high water mark of the Association’s claim to possession is the bland and unhelpful statement that at all material times, the Association ‘and/or its members have been in undisturbed and peaceful occupation of a public space near Buffalo City Public FET College where they are conducting a business of street trading’ and that they sell second-hand cars. The affidavit says nothing about how the Association claims to possess the entire area, how many of its members use it, and how often they use it.

[20] Fani, in his answering affidavit, denied that the Association was in peaceful and undisturbed occupation of the area which, he says, is owned by the Metro and is zoned as a ‘Public Road – Transport Zone II’ and consists of ‘demarcated public parking spaces which are provided for the benefit of and utilised for the general public as parking for their vehicles whilst visiting the area’. He takes issue with the claim to possession that I have quoted above for various reasons. These include:

'23.2.2 Put at its highest, various street traders, who may claim membership of the Applicant arrive, perhaps daily, and then sell their wares, being motor vehicles, for clients, each taking up such parking space as may be available to them and then plying their trade until they decide to leave. If another party happens to in one or other parking space, neither the association, nor its members will contend any right to re-assert their occupation of the parking space in question.

. . .

23.2.5 I am advised that possession implies inherent control. The Applicant or its Members cannot be said to be in control of the public space as it/they vacate the premises on a daily basis during which periods it is unable to exert any control over the public space. The Applicant or its Members are unable to prevent the use of the public space by any other party. The Applicant can therefore not be said to be in possession of the public space.'

[21] From the above, I conclude that, at best for the Association, there were occasions when some of its members parked second-hand cars in parking places available for the public in the area for a time. A car would vacate the parking place either when it was sold or when the member of the Association decided to stop trying to sell it. If he[9] returned the next day and the parking place that he had occupied had been taken, he would, I presume, park somewhere else. There is no suggestion that he would have been dispossessed by the member of the public who parked where he had parked, and be entitled to a spoliation order against that person. Similarly, if a memorial service was to take place at the War Memorial on 11 November of a year, there is no suggestion that those attending it had dispossessed the Association.

[22] As I understand the Association's case, when it is boiled down to its bare essentials, it really lays claim to no more than a few parking places that cannot be identified and which change from day to day. No case is made out, even remotely, for possession of the area described in the notice of motion.

[23] Possession, say Van der Merwe and Pope, is 'the compound of a factual situation and a mental state, comprising the actual control or detention of an item of property (corpus) coupled with the will to possess the thing (animus possidendi)'.^[10]

[24] In this case, the Association has not established that it, presumably through some of its members parking cars for varying periods in the general area referred to in the notice of motion, can be said to have been in possession of the area. There is simply no factual basis for the claim to possession. At best for the Association, it established that an undisclosed but small number of members, on undisclosed dates and for undisclosed periods of time, sometimes parked cars in marked parking places established for public use in the vicinity of the Buffalo City Public FET College. That, in my view, falls well short of establishing either physical control over the property or the required intention to possess it.

[25] The Association accordingly failed to discharge the onus resting on it to establish its possession of the property and the application should have failed in the court below on this basis alone.

Was the Association dispossessed?

[26] Even if I am wrong in respect of the question of whether the Association was in possession of the property, I am of the view that it has failed to establish that it was dispossessed.

[27] The act that it relied on as an act of dispossession is some of its members being warned, on 15 April 2013, by officials of the Metro that if they did not move their cars from the area, those cars would be impounded in terms of the By-law on Street Trading.

[28] I cannot see how this could conceivably be regarded as an act of dispossession. But even if it was, the Metro's officials acted lawfully. It was argued that while they may have had statutory authority to impound the Association's members' cars in terms of the By-law on Street Trading, they were not empowered by the By-law to warn people that they may use their powers. That argument only has to be stated for its absurdity to be apparent. In any event, precisely this situation is envisaged by ss 7(1) and (3) of the By-law with the result that, even if the warning was a dispossession, it was not illicit but lawful.

[29] It was also argued that the only lawful manner in which the Metro's officials could have the Association's members move their cars from the parking places they occupied was through a successful application to court for an eviction order. Once again, this argument only has to be stated to be rejected.

[30] The magistrate held that the By-law on Street Trading did not apply because, as I understand his reasoning, the street traders whose conduct it regulated were only those who traded lawfully in terms of a trading permit, and not rogue street traders such as the Association's members who traded without permits. This reasoning, it seems to me, is much like the discredited argument in labour law that a dismissed worker could not sue on the basis of his or her dismissal being an unfair labour practice because that is only open to an employee, and once he or she had been dismissed, he or she ceased to be an employee. One wonders what the purpose of the enforcement provisions of the By-law may be on this interpretation.

[31] In my view, the magistrate was wrong in his interpretation of the By-law on Street Trading. It empowered the Metro's officials to impound the Association's members' cars because they were acting unlawfully by street trading without a valid permit. Offering them the opportunity to cease their unlawful conduct appears to me to be the type of proper, sensible and proportional law enforcement that ought to be commended rather than condemned, as the Association would want us to do.

[32] Finally, it is necessary to say something of the role of the Minister and Mundell. All that Mundell did on 15 April 2013, on his version (which I accept), was to issue J534 notices to members of the Association who were present. He attached copies of the J534 notices. They number two. Mundell denied having ordered the members of the Association to leave the

parking places that they occupied. He, and his employer, the Minister, thus played no part in the alleged dispossession relied on by the Association and no order should have been made against the Minister.

The interdict

[33] Paragraph 2.3 of the order granted by the magistrate is an interdict restraining the Metro and the Minister 'from unlawfully

interfering with Applicant's possession or occupation of the said public space near Buffalo City Public FET College'.

[34] In order to be granted an interdict, an applicant must establish, inter alia, that a clear right has been infringed or is threatened.[11] On this basis alone, the interdict should not have been granted: the Association had no right to the area it claimed to possess and what it wanted to protect was its members' continuing to trade unlawfully.

Costs

[35] I intend ordering the costs to follow the result in the court below and on appeal. I also have to determine liability for the costs wasted on 13 February 2015 when the matter was removed from the roll, with the costs reserved, because there was no appearance for the Association.

[36] An application has been made for those costs. An affidavit deposed to by Fani explains the circumstances that led to the postponement of the matter. The application is opposed by the Association. The facts are not in dispute.

[37] When there was no appearance for the Association on 13 February 2013, the investigations of the legal representatives of the Metro and the Minister revealed that the Registrar had sent a notice of set down to the Association's attorneys by registered mail but it had been returned to sender.

[38] Fani alleged that despite the Association's attorneys not having received the notice of set down, they ought to have known that the matter was set down for 13 February 2015 because the Metro's heads of argument were served on the Association's attorneys on 22 January 2015 and the filing sheet stated that the date of the hearing was 13 February 2015. In addition, various other documents concerning the appeal were served on them during January and February 2015, including an application for the late filing of the heads of argument of the Minister and Mundell.

[39] The answer of the Association was deposed to by Sondaba and confirmed by its attorney, Mr LK Godongwana. Their answer to these allegations is as disingenuous as it is lacking in substance. Sondaba stated:

‘The first appellant submitted that it is not possible that the respondent’s attorney was unaware of the appeal hearing due to the fact that the notice of filing of the first appellant’s Heads of Argument stipulated the date when the appeal would be heard. I am advised and verily believe that this submission is absurd, the purpose of notice of filing is only to notify the other party that a document is filed and not to set the matter down for hearing. Consequently, my attorney’s none appearance of the hearing on 13th of February 2015 was appropriate in the circumstances as there was no notice of set down for the said hearing.’

[40] Godongwana stated that although he received the Metro’s heads of argument, he did not ‘look at the date stipulated in the notice of filing as the date when the appeal would be heard’ and was as a result unaware ‘that the matter was already set down’. He proceeded to say:

‘I cannot fathom the first appellant’s demand of the costs occasioned by the matter not proceeding on the 13th of February 2015 when the first appellant is in fact aware that the notice of set down did not reach me. I hold the view that the

bringing of this application amounts to nothing less than frivolous and vexatious proceedings which this Honourable Court may simply

discourage by granting costs order against the first appellant.’

[41] These responses display a complete lack of insight into how a reasonable attorney should have responded to receiving the Metro’s

heads of argument and the other documents that were served on Godongwana. If anything, the opposition to the application, rather

than the application itself, was frivolous and vexatious.

[42] An attorney in Godongwana’s position would have realised that the appeal was coming up for hearing because of the mere fact that documents concerning it were being served on him. He would have perused the filing sheet to the Metro’s heads of argument and then he would have seen that the date of the appeal was 13 February

2015. He would have telephoned the Metro’s attorney as soon as possible in order to seek clarification, and then would have known that the matter had been set down. It is simply not good enough to say, as Sondaba in effect does, that the filing sheet bearing the date of the appeal could simply be ignored because it is not a notice of set down. To then describe the Metro’s submissions as to why the Association should bear the costs as absurd compounds the lack of insight and adds insult to injury.

[43] In conclusion, the Association's attorney ought to have known that the matter was to be heard on 13 February 2015. A modicum of care would have given him this knowledge. His lack of knowledge is due to his negligence. The Association must bear the wasted costs for 13 February 2015, and for the application for an order to that effect. I add that the application was necessary: the matter could not properly have been decided by way of submissions from the bar.

Conclusion

[44] In summary, and for the reasons stated, neither a spoliation order nor an interdict should have been granted by the court below. The appeal must succeed with costs and the order of the court below will have to be set aside and replaced with the order that should have been made – a dismissal of the application with costs. In addition, the application for the wasted costs of 13 February 2015 succeeds with costs.

[45] I make the following order:

- (a) The appeal succeeds with costs.
- (b) The order of the court below is set aside and replaced with an order dismissing the Association's application with costs.
- (c) The Association is directed to pay the wasted costs occasioned by the removal of the appeal from the roll on 13 February 2015 and to pay the costs of the application brought in that respect.

C Plasket

Judge of the High Court

I agree.

I Schoeman

APPEARANCES

First appellant: M Beard instructed by Netteltons

Second and third appellants: AM De Silva instructed by Mili Attorneys

Respondent: S Nzuzo instructed by Cloete and Company

[1] Constitution, s 1(c).

[2] See for instance Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of South Africa & others 2000 (2) SA 674 (CC).

- [3] AV Dicey *An Introduction to the Study of the Law of the Constitution* (10 ed) at 193.
- [4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984
- (3) SA 620 (A) at 634G-I; *National Director of Public Prosecutions v Zuma*
- [2009] ZASCA 1; 2009 (2) SA 277 (SCA), para 26.
- [5] Promulgated in Local Authority Notice 56, Provincial Gazette Extraordinary No. 1489 of 17 February 2006. Section 1(1)(xxxi) defines the term ‘street trader’ as ‘a person carrying on the business of street trading . . .’ and s 1(1)(xxxii) defines ‘street trading’ to mean ‘the selling of any goods or the supplying or offering to supply any service for reward in a public road or public place by a street trader’.
- [6] Section 2(a) of the By-law on Street Trading provides that nobody ‘shall carry on the business of a street trader . . . without a valid trading permit’.
- [7] Section 2(1) of the Second-Hand Goods Act provides that everyone who ‘carries on business as a dealer must be registered’. A dealer is defined in s 1(1) as a ‘person who carries on a business of dealing in second-hand goods’. The term ‘goods’ is defined as ‘any goods specified in Schedule 1. Included as goods in Schedule 1 are motor vehicles and other vehicles. Section 32(1)(a) makes it an offence for a person dealing in second-hand goods to fail to register.
- [8] This advice was reminiscent of the advice given in *S v Waglines (Pty) Ltd & another* 1986 (4) SA 1135 (N) at 1144I in which Didcott J observed: ‘I find it barely credible that advice so bad could conscientiously have been given.’ See too *S v Longdistance (Natal) (Pty) Ltd & others* 1990 (2) SA 277 (A) at 283D in which Nicholas AJA described the reasoning in an opinion as a travesty and said that its conclusion was ‘palpably absurd’. As to the duties of legal practitioners in giving advice in cases like this, see *S v Longdistance (Pty) Ltd & another* 1986 (3) SA 437 (N) at 444F-G.
- [9] The members of the Association who are named in the papers all appear to be men.
- [10] Du Bois (ed) *Wille’s Principles of South African Law* (9 ed) at 445.
- [11] Cilliers, Loots and Nel Herbstein and Van Winsen: *The Civil Practice of the High Courts of South Africa* (5 ed) (Vol 2) at 1456.

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