

SOUTH AFRICA / JUDGMENT

Chetty v Chetty (5510/19) [2020] ZAMPMHC 18 (14 January 2020) [2020] ZAMPMHC 18

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

5510/19

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IN

THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA
DIVISION, MIDDELBURG
(LOCAL
SEAT)

CASE

NO: 5510/19

In

the matter between:

SUMESHEN
CHETTY
APPLICANT
AND
SAMANTHA
CHETTY
RESPONDENT

JUDGMENT

BRAUCKMANN AJ

[1] This is an urgent application that was launched by the applicant for the following relief:

[1.1] condonation for not complying with the rules;

[1.2] that a mandament van spolie be granted and a rule nisi issue calling on the respondent to show cause on 20 January 2020, at 10h00 or soon thereafter this matter may be heard, why the respondent should not be ordered as follows:

- a. to return the 2011 Freightliner Agassi 530 with registration number [...]MP and VIN number [...] return the 2011 and Freightliner Agassi 530 with registration number [...]MP VIN number [...] as well as its trailer bearing registration number [...]MP and [...]MP to the applicant immediately; and
 - b. that this mandament van spolie serves and operates as an interim order pending the finalisation of the application referred to above all that the respondent pay the costs of the application on the scale of between attorney and client.
- [2] Such an order was made by the Court, and the return date was the 20th January 2020. The respondent initially filed an application for leave to appeal which, according to the respondent, was withdrawn and the costs of the application tendered. The respondent then anticipated the return date with 12 hours' notice, as it was entitled to do in terms of the Court order, and that is why we are here today.
- [3] The applicant's case is a simple one. The applicant states that, and it is common cause, he and the respondent used to be in a relationship and they agreed according to the respondent that the respondent would provide applicant with funds to buy a truck and trailer. He will then repay the truck and trailers to the respondent. Applicant will use the said truck and trailers in a business of his own.
- [4] Applicant states that on about 1 December 2019 he was phoned by his driver, Mr Zwane who informed him that the respondent took him to the police station and that he was threatened and was asked to give the keys to the truck to the respondent. The applicant then said he will obtain, try to obtain an affidavit from Zwane confirming it.
- [5] This application was heard, as I stated, as a matter of urgency it was ruled to be urgent and a rule nisi was granted. The respondent opposed the application and filed an opposing affidavit. The respondent's case is the following: The applicant and she was in a relationship and tried to "patch up their romantic relationship" from August to November. During this time the applicant approached her with a proposal to get involved in the transportation of timber in Swaziland (eSwatini).

- [6] In terms of the transaction Montigny, a major forester in eSwatini, would contract Nawe Investments ("Nawe") in eSwatini to transport timber to mills. She then states that:

"Our enterprise would lease a truck to Nawe in turn, which would expand Nawe transport capacity in serving Montigny's needs."

- [7] The respondent then proceeds to deny the facts set out in the applicant's founding affidavit where it is stated that the

respondent would fund the purchase price of the trucks and that he would repay her as he was proceeding with the business that he was to conduct with the truck. The respondent states that the applicant had business connections in eSwatini, that he felt confident that he would be able to secure contracts for the transportation of timber and that the contract would be in the form of a lease or some other mechanism in terms whereof the profits would be shared.

- [8] Respondent stated that she did not see the contract. She states that the applicant did not have access to capital to secure a contract, and by way of her own funds she accessed equity that was locked up in a bond and a loan from her parents she acquired the money which she gave to the applicant to buy trucks. She states that truck and trailer would remain her property until it was paid in full. It is apparent from the Annexures to the papers that the trucks and other effects are registered in the respondent's name.

- [9] The nub of the respondent's case is that the truck was delivered by the applicant in eSwatini and to Nawe. That the driver,

Zwane Mankoba Nkosinati ("Nathi") was employed by Nawe as driver of the truck and that the applicant was therefore not in possession of the truck. She states in paragraph 2.10 of her opposing affidavit:

"The horse and trailers were delivered to Nawe in Swaziland (after undergoing repairs during October 2019 in Kempton Park) around 5 November, which took undisturbed possession and control of the vehicles."

2.11 "Nawe also employed the driver to operate the horse and trailer by the name of Zwane Mankoba Nkosinati (Nathi) who was a Swaziland (sic) citizen."

- [10] Her case is that Nawe was in possession of the truck and trailer at all relevant times and that the applicant was not. To that effect, she attached an affidavit by Nathi which states that he was employed by Nawe. The content of the affidavit is important and I will quote from paragraph 3 onwards:

"I solemnly swear and declare under oath 10 that I am being the driver of truck registered [...]MP, employed by Nawe Ukenzama Investments, under the instructions of the police and the owner of the truck Samantha Neicker ID number [...] of Witbank, at Bhynya police station requested to hand over the truck keys and truck to them but I was never threatened by Samantha Neicker after they have explained every information about the ownership of 20 the truck. I also continue to work for Samantha Neicker for the month of December 2019 under the instruction of Nawe Ukenzama Investments

director. Also present at the station was Nahwe Ukenzama Investment two directors below is the truck info:.....”

[11] Now, what is important it is the respondent’s version that the applicant was never in undisturbed possession, but that they were in undisturbed possession. She states in her affidavit that the applicant was to pay all instalments in respect of this truck to her and that he failed to pay such instalments and that was the reason why she decided to take possession of the truck. There is actually an email attached to the founding affidavit to that effect.

[12] On page 21 of the bundle the respondent, in Whatsapp message to applicant dated 25 November 2019, stated the following:

“Hi. Hope you are well. Please inform Nathi next month would be his last month. I am taking the truck and trailer back. I owe the bank R290 000 for the horse and 150 000 to my parents for the trailer. Also 80 900 to the credit card for all the repairs and instalments for October -- total 520 900m for all that you put forward to it you can take all the money that will be paid for the loads done in November and December until shut down. I will be in contact with Nathi to bring the truck back closer to the time. Take care “

[13] Nathi, on 1 December 2019, and after the applicant informed him not to hand the truck back as the Court must order them to hand the truck back enquired from Nathi via Whatsapp:

“Morning did you hear anything?”

Nathi responded:

“Morning as well boss. She sent a message last night around 11n said is d border n will meet ds morning, she will go to d police station.”

The applicant then replied:

“Okay. I think you must only if the police call and ask you. Otherwise they must send her back. There is nothing she can do until the matter goes to court.”

The applicant followed this up with another Whatsapp:

“I do not want her thinking she can call you and give you instructions as she feels. The letter from the attorney asks her not to do this and to keep away. So if she calls to meet you, tell I instructed you not to.”

This was also followed up with a Whatsapp by the applicant stating the following:

“The truck must not be released. Inform the cops as per the attorney's letter that it needs to be handled in court and she cannot take the truck. She is niw [sic] (must me now) acting against the law which is causing damages to my business.”

[14] It is significant to note that the respondent states that she is the owner of this truck and trailer. That she is the owner of the truck and trailer is actually irrelevant. Whether she is the owner or not, I have to decide whether the applicant was in undisturbed possession on 1 December 2019 and whether this undisturbed possession was disturbed by, or taken away by the respondent on the said day.

[15] In *George Municipality v Vena and Another*, 1989 (2) SA 263 (A) at 271, D-E, Milne JA stated as follows:

“It is a fundamental principle of our law that a person may not take the law into his own hands.”

This was confirmed in the context of the mandament van spolie in *Ngqumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) at 17. The mandament van spolie is a possessive remedy. It is not concerned with the lawfulness of the possession of the applicant, nor the ownership of the object. The applicant does not have to show that he is entitled to have possession of the property. See in this regard *Ngewu v Union Cooperative Bank and Sugar Co Ltd* 1982 (4) SA 390 (N) at 394. The principle was also confirmed by the Supreme Court of Appeal (SCA) in *Ivanov v North West Gambling Board and Others* 2012

(6) SA 67 (SCA) at 25, and in *Ngumba*, supra, page 21.

[16] The possession to be proved is not possession in the juridical sense but it may be enough if the holding of the applicant was with the intention of gaining some benefit for himself or herself, accompanied by the physical element, detentio. The physical element implies physical control rather than physical possession. See *Yeko v Qana* 1974 (3) SA 735 (A) at 739 D-E, and *Reck v Mills* 1990 (1) SA 751 (A) at 755 G-I. The possession also does not have to be exclusive possession. Spoliation will succeed if an applicant have possession jointly with somebody else. See *Nienaber v Stuckey* 1946 AD 1049 at 1056. In other words, if a joint possessor of a thing is deprived by the other possessor, and such other possessor takes exclusive possession, spoliation took place. See *Rosenbuch v Rosenbuch* 1975 (1) SA 181 (W). A partial deprivation of possession will amount to spoliation if the respondent deprived the applicant's control, or partial control, over the property in question.

[17] In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) in paragraph [26], Harms DP, as he was then, confirmed the well-entrenched rule in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A). The proceedings before me is not suited to dissolve factual disputes. It is not designed to do so. It is not designed to decide the probabilities. Motion proceedings are all about common cause facts. For a final order to be granted in motion proceedings if the facts averred in the applicant's affidavit which is admitted by the respondent together with the facts alleged by the latter justifies such an order, it may be granted, unless the respondent's version is farfetched, untenable, or amounts to bald denials.

[18] It is important to note what the respondent admitted in the applicant's founding affidavit and in his case. The transaction

between the applicant and the respondent as far as the purchase of the truck and trailer is admitted. The fact that the truck and

trailer will remain the respondent's property until paid in full seems to be admitted. That the applicant took delivery of the truck, repaired same, and handed it to Nawe to operate on his behalf seems to be in dispute, although the dispute surrounding same is only limited to the fact that Nawe would operate the truck on behalf of the enterprise which, during argument, Mr Lambrecht acting on behalf of the respondent, said was akin to a partnership. The respondent admits that the applicant had to pay certain instalments to her.

[19] The respondent took exclusive possession of the truck and trailer with the cooperation of the driver Nathi in eSwatini. The applicant did not consent to such deprivation of joint possession. That according to the respondent the applicant and the respondent in terms of which it seems as if the applicant's version (apart from the enterprise) is corroborated by the respondent. What is important is to note that the respondent 20 seems to blow hot and cold. She alleges that she is the owner of the vehicle. Her motive for taking the vehicle back is because the applicant according to her did not pay. She states that they were involved in a joint enterprise and I have already referred to the judgement in Rosenbuch where it was decided that if joint possession is disturbed, or taken away, it amounts to spoliation. Those contentions regarding the alleged joint possession worsens the position for the respondent. Her version is full of contradictions. She alleges that they entered into an enterprise and in terms of the enterprise they provided this truck to Nawe.

[20] It is further stated that not the enterprise but the applicant should pay the instalments to her. She agreed that the horse and trailer be dispatched to eSwatini. So much appears from the annexures to the he applicants founding affidavit. The applicant annexed Whatsapp messages between him and the respondent and a very important Whatsapp message can be found on page 16 of the indexed bundle where the respondent states:

"Congrats on your truck lol -- I am really proud of you and I know this time you are going all the way up"

The next one reads:

"I will celebrate with you next week."

The Whatsapp messages on page 17 of the indexed bundle, confirms amongst others that the applicant is paying certain instalments to the respondent. On page 19 the respondent says to the applicant in an email:

"You spend so much time with your truck." [Own emphasis]

- [21] It is clear that the applicant's version is corroborated by the respondent in her version. The respondent's version cannot be accepted. She, although she is the owner of the truck and even if the applicant failed to honour his agreement, could not have convinced Nathi to surrender the keys. It is clear that the applicant was in undisturbed possession until 1 December 2019 and with the assistance of the police, the respondent convinced Nathi to hand the truck's keys to her.
- [22] Even if I am wrong, and even if I accept the respondent's version that the applicant and the respondent were in an enterprise, her indication in the Whatsapp that I referred to on page 21 of the indexed bundle, read with the Whatsapp messages exchanged between the applicant and Nathi on page 22 and 23 it is clear that respondent intended to take the truck on 1 December 2019, or in December, or whenever she intended to do so, without the permission of the applicant.
- [23] Mr Tyson referred me to authority stating that where one convinces a servant to relinquish possession without authority from the master such will amount to spoliation, I do agree with that proposition.

I therefore find that the respondent spoliated the applicant and I confirm the rule nisi, but not the cost award.

[24] The order is as follows:

[24.1] the respondent shall forthwith return the 2011 Freightliner Agassi 530 with registration number [...]MP and VIN number: [...] as well as its trailer bearing registration numbers [...]MP and [...]MP to the applicant.

[24.2] the respondent is ordered to pay the applicant's costs.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPELLANT: ADV TYSON

INSTRUCTED BY: HARVEY NORTJE WAGNER & MOTIMELE INC

REPRESENTATIVE FOR THE RESPONDENT: ADV LAMPRECT

INSTRUCTED BY: D VAN WYK AND ASSOCIATES

DATE OF HEARING: 14 JANUARY 2020

DATE OF JUDGMENT: 14 JANUARY 2020 (EX TEMPORE)

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Prepared on 10 October 2026 · Esheria