

SOUTH AFRICA / JUDGMENT

Jobela v Member of the Executive Council Responsible for the Department of Transport: Eastern Cape (2326/2024) [2024] ZAECMHC 57 (25 June 2024)

[2024] ZAECMHC 57

COURT

Eastern Cape High Court, Mthatha

BEFORE

Majiki

CASE / FILE NUMBER

2326/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MTHATHA)

Case

No. 2326/2024

Heard

on: 13 June 2024

Date

delivered: 25 June 2024

In

the matter between: MASONGWANDILE
 MULTITUDE JOBELA
 Applicant
 And
 MEMBER
 OF THE EXECUTIVE COUNCIL
 responsible
 for THE DEPARTMENT OF

TRANSPORT: EASTERN CAPE
 Respondent

JUDGMENT

MAJIKI J:

- [1] The applicant approached this court by way of urgency seeking restoration of the possession of his bus. The bus was impounded by traffic officers of the department of the respondent on 2 July
2024. The application is opposed by the respondent. It was heard as an opposed application, with all three (3) sets of affidavits filed, in the afternoon on 13 June 2024.
- [2] The conduct of the legal representatives representing the applicant is somewhat disconcerting in this matter. Firstly, around 17h00 on Tuesday 11 June 2024 the Court, whilst still busy with unopposed motion court roll, realised it would not get through to the entire roll of urgent applications. That roll being handled after the unopposed roll has been completed. The Court engaged legal representatives regarding the re-scheduling of the hearing of the urgent court roll, within the same week. Counsel for the applicant persisted that the applicant's matter required to be heard, it was extremely urgent because the applicant was losing daily income in the sum of R60 000,00. The matter was eventually heard on 13 June as aforestated, with other matters in the urgent Court after the court finished the opposed court roll.

Judgment

was reserved. Subsequently the applicant emailed no less than three (3) documents including supplementary heads of argument for the Court's attention, without any prior arrangement or involvement of the respondent, other than the stamp on the supplementary heads of argument indicating that there had been service on the respondent.

- [3] Finally, on Tuesday 18 June 2024 whilst the Court was busy preparing judgment the applicant sent through a letter to the registrar requesting urgent delivery of judgment. When the matter was heard it was among other matters that had been enrolled in the urgent court. The degree of urgency in each of those matters depended on a number of considerations, including the nature of the protection sought.

The applicant would have made out his case on urgency in the papers and submissions made in court. It would not be courteous for his representative to inundate the court with further presentations on the issue, firstly in open court whilst trying to schedule a hearing and after judgment had been reserved.

- [4] It is common cause that on 2 June 2024 along R61 near Mthatha airport, the traffic officers in the course of their duties conducted a roadblock and did routine inspection to ensure that motor vehicles were road regulation compliant. The officers stopped the applicant's bus, with registration letters and numbers JBL[...]. They noticed that no licence and roadworthy disc was displayed as required of such vehicles operating in public road.
- [5] The bus had a load of passengers who were being transported from Mthatha to Cape Town. The driver of the bus, Mr Tshem explained that the disc was withheld by the licencing department. According to the applicant the driver said it was withheld due to some minor issue related to his other vehicle. According to the respondent the driver said disc was withheld because of the outstanding payment in another motor vehicle belonging to the applicant, that blocked the release of all other discs for the applicant's motor vehicles.
- [6] It is also common cause that Mr Tshem was issued with notice and seems to appear in court in terms of section 56 of the Criminal Procedure Act 51 of 1977 (the CPA). He was further issued with notice of intention to prosecute for an offence of driving unlicensed motor vehicle and that notice was endorsed, AN AG amount of R4 000.00 must be paid.
- [7] In the notice that includes summons, reference was made to regulations 18 and 36(1) read with section 89 of the National Road Traffic Act 93 of 1966 (NRTA). He was called upon to appear in court to answer to charges of wrongfully operating a bus on a public road with an unlicensed vehicle (sic) contrary to term (sic) and conditions of an operating licence. Further, that the driver failed to produce a valid licence. He was informed to pay an admission of guilt of a sum of R1 500.00 and R300.00 on an alternative charge. The bus was then impounded.
- [8] According to the applicant Mr Tshem informed the respondent's officers that the bus license disc was withheld for a minor issue related to his other vehicle. The license for this bus had been recently renewed and paid for around 3 April 2024. Mr Tshem was in possession of a document which proved that. The officer refused to have a look at the said document. They also refused to speak to the applicant over the phone. They issued the notices referred to above. They failed to check in the licensing department's data base if his license disc was not paid for and renewed.

- [9] The applicant's case is that his bus was irrationally, unlawfully and unconstitutionally impounded, without a court order or statutory provision or law authorising the dispossession. He views the transfer of his passengers to bus called by the officers as a possible collusion to deprive him of earnings to benefit another bus owner.
- [10] According to the applicant the matter is extremely urgent. He is losing R60,000.00 a day. The respondent ignored use of less restrictive means through which he could be reprimanded with.
- [11] On Monday 3 June 2024 he went to the Provincial Traffic Office in Mthatha but could not be assisted. There are no details of the assistance he went to seek there.
- [12] The applicant listed the circumstances under which the law provides for the impounding of a motor vehicle. He submits that impoundment is permitted under exceptional circumstances, it is a drastic measure. The impoundment of his vehicle does fall under those. He attached the license of the bus and a long-distance operating license. According to the applicant the bus was impounded in terms regulations 18 and 36(1) read with section 89 of NRTA.
- [13] He further says the respondent or his employees failed to advise him that, in terms of section 84(3) of NRTA, he could obtain a temporal permit in order to operate his bus on a public road.
- [14] Further, section 87(1) of National Land Transport Act 5 Of 2009 (NLTA) provides for impoundment but the notices issued were not premised on this section.
- [15] With regard to the requirement of an interdict the applicant made submissions regarding both those for interim and final interdict.

Regarding alternate remedy, for the speedy return of the possession of his bus which he was unlawfully disposed of, he says he has none. He continues to suffer harm by losing daily income his family depend on for food, health, electricity and clothing.

- [16] The deponent on behalf of the respondent is the acting head of the department, he is the accounting officer responsible for the use of resources and collection of all monies due to the department. He says he is authorized to depose to the affidavit and is familiar with the circumstances of the matter. He disputes that the impoundment of the bus was unlawful. He avers that after the officers stopped the bus, Mr Tshem explained that the disc in respect of the licensing of the bus was withheld because of outstanding payment of another vehicle belonging to the applicant.
- [17] The officers informed Mr Tshem that they would not allow the bus to continue being on the road. He was in contravention of several statutory provisions, section 42(2) of NRTA and 87(1) of NLTA.

[18] The respondent submits that the applicant's financial loss on its own cannot be a reason to allow unlawful conduct to continue.

[19] According to the respondent the applicant has an alternate remedy, to pay the fine and or the outstanding amount to get his disc.

[20] Both the applicant and the respondent listed circumstances under which a motor vehicle maybe impounded, including:

- Where a vehicle did not display any form of identification.
- Where taxis or buses have no permit or operate contrary to the permit and
- A vehicle that is not roadworthy in any form, manner or conduct.

[21] The respondent annexed a sworn statement deposed to by officer Bruce. He is the one who interacted with the applicant's driver and eventually impounded the bus. Summarily, he said upon finding out that the bus did not have a disc displayed, he asked officer Mpolweni to issue the documents that the applicant annexed to his founding affidavit, in particular, the notice of intended prosecution which states 'the bus must be pounded (sic) due to unlicensed disc or fail (sic) to display valid license disc since it was operated on a public road ferring passengers for reward. Section 90(1) (b) read with section 50(1) of NLTA, operating a public transport vehicle contrary to terms and condition(sic) of operating a license.

[22] According to the applicant, the respondent's reference to other statutes than regulations 18 and 36(1) read section 89 of NRTA together with the statement by officer Bruce attached to the answering affidavit is an afterthought.

[23] Section 42 (2) of NRTA provides:

'No person shall operate a motor vehicle on a public road unless the requirements in respect of certification of roadworthiness contemplated in subsection (4) in relation to such motor vehicle are complied with, and except in accordance with the conditions of such certification of roadworthiness'.

Section 87(1) NLTA provides:

'An authorised officer who is satisfied on reasonable grounds that a motor vehicle is being used by any person for operation of a public transport without the necessary operating license or permit or contrary to the conditions thereof, may impound the vehicle, pending the investigation and prosecution of that person an offence mentioned in section 90(1)(a) or (b)'.

Regulation 36(1) provides:

'The owner of a motor vehicle shall display a licence disc and/or a licence and road- worthy certificate disc, whichever the case may be, issued in respect of such motor vehicle'.

Regulation 18 provides:

‘Subject to the provisions of regulation 19 and 20, every motor vehicle in the Republic shall, whether or not is operated on a public road, be licensed by the owner of such motor vehicle, in accordance with provisions of this part with the appropriate registering authority’.

[24] In *Yeko v Qana* 1973(4) SA 735 A at 735 G, mandament van spolie was described as:

‘The fundamental principle of remedy is that no one is allowed to take law into his own hands. All that the spoliatus has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted’.

[25] The starting point is the urgency of the matter. Indeed, by its very nature mandament van spolie is a speedy remedy aimed at restoration of possession to a person who has been unlawfully deprived of possession. According to the applicant his bus made income of R60 000.00 a day for his family. In that regard the nature of the application is that of commercial urgency. The directives issued upon consideration of certificate of urgency on Wednesday 5 June 2024 referred the hearing of the matter to the normal motion court day the following Tuesday, 11 June 2024. Ordinarily, that enrolment did not even require a directive in terms of rule 12 (c) of the Joint Rules of Practice. The Judge in her wisdom, did not regard the matter as extremely urgent as the applicant would want the matter to be handled. It is trite that depending on several considerations, commercial interest may or may not require such protection as matters involving threat to life or liberty. This court agrees with the Judge that issued directives that the matter is not as urgent as to warrant the conduct of the applicant’s legal representatives outlined earlier in the judgment.

[26] The next consideration is the absence of alternative relief. The applicant does not explain the nature of the minor administrative issue that makes the licensing department to withhold his disk. He also does not explain the difficulty he has in solving the said minor issue. Even when he went to the provincial office, he does not furnish details of what transpired in that office. According to the respondent Mr Tshem said the disc was withheld because the applicant’s other motor vehicle had an outstanding payment. This was not seriously disputed in the applicant’s reply, except to refer to the issue as some administrative reason.

[27] At the time of the drafting of his founding papers he was aware that he could also apply for temporal license. He does not allege that there were impediments in the making such application.

- [28] In this light, the spoliation being a final relief the applicant has failed to show that he has no other satisfactory remedy. According to the respondent, which submission this Court agrees with, payment of the outstanding amounts is a remedy that would address the issue of the withheld disk. Alternatively, that and/or payment of fine would allow the bus to be released to the applicant.
- [29] The first requirement that the applicant needs to prove in spoliation proceedings is common cause. The issue that requires determination is whether the applicant was unlawfully dispossessed.
- [30] In that regard, as a start the Court considers the version of the applicant himself. Section 56 of CPA notice attached to the founding affidavit contained a notice of intention to prosecute the applicant for specified offences, including that 'operate a blue and yellow bus on a public road with an unlicensed motor vehicle (contrary to term and conditions of operating license). The court notes that the endorsement is not phrased in strict a replication of section 87(1) which is, a motor vehicle is being used by any person for operation of a public transport without the necessary operating license or permit or contrary to the conditions thereof. However, the Court of the view that, in essence, the offence is sufficiently described. It cannot be said reference to section 87(1)

in the answering affidavit is an afterthought in the light thereof. Further, according to the respondent officer Bruce told Mr Tshem that he would not be legally allowed to continue driving the bus without license.

- [31] The applicant submits that officer Bruce refused to look at the documents that would prove that the disc of the bus has been licensed and paid for or to speak to him on the phone. According to the respondent after Mr Tshem explained that the disc was withheld, officer Bruce advised Mr Tshem that he was in contravention of several statutory provisions. Noteworthy, over and above the requirement of section 87(1) of NLTA, among the instances that both litigants agree that a motor vehicle may be impounded for, include, not being roadworthy, as provided for in section 42(2) of NRTA.
- [32] The applicant does not address the issue of roadworthiness of the bus. That information would have been on display had the disc been affixed as required. Regulation 18 requires that a motor vehicle to display of license and roadworthy certificate disc as in this instance, that of a bus.
- [33] The applicant seeks a final order, according to the principle in the often referred to Plascon-Evans Paints LTD v Van Riebeeck Paints (PTY) Ltd 1984(3) SA 623 at paragraphs 7 to 9, this court must accept the version of the respondent unless it is far fetched or is untenable. In my view, there is no basis to find that the respondent's version is farfetched, the respondent would not have admitted that Mr Tshem explained that the disc was withheld, in the first place.

- [34] In considering whether the dispossession was unlawful the court must have regard to the position as at the time of the dispossession. In the circumstances, the court is unable to conclude that the dispossession was unlawful.
- [35] With regard to costs both litigants prayed for cost on punitive scale. The respondent specifically submitted that the applicant burdened the papers with legal arguments and authorities in the affidavits, instead of limiting the affidavits to factual averments. Indeed, that put strain and made dealing with the matter unnecessarily cumbersome, whilst the same applicant was putting pressure in the finalization of the matter.
- [36] That said, having regard to what the Constitutional Court said in *Ngqukumba v Minister of Safety and Security and others*, 2014
- (2) SACR 325 (CC) at paragraph 9, that, spoliation involves issue relating to possession, a subset of right to property and a legal issue that is Constitutional, this court is not inclined to apply the general rule and make an order of costs against the applicant.

In the result,

The application is hereby dismissed.

B MAJIKI

JUDGE OF THE HIGH COURT

Appearances: Applicant Mr Nonkelela Instructed by Messrs Mgudlwa Attorneys No. 18 William Avenue Vincent EAST LONDON c/o Titi W Attorneys No. 47 Cumberland Street MTHATHA
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