

SOUTH AFRICA / JUDGMENT

Matsipe v SAI Group (Pty) Ltd (34618/17) [2017] ZAGPPHC 319 (2 June 2017)

[2017] ZAGPPHC 319

COURT

North Gauteng High Court, Pretoria

BEFORE

Mabuse

CASE / FILE NUMBER

34618/17

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 34618/17

DATE:

2 June 2017

THATO

BONYFICIOUS

MATSIPE

Applicant

V

SAI

GROUP (PTY)

LTD

First Respondent

JUDGMENT

MABUSE J:

[1] This is an application, brought on an urgent basis, for spoliation. The applicant, Mr. Thato Bonyficious Matsipe, an adult

male residing at [...] S. C., H. E., Centurion West, Pretoria, seeks, among others, the following order against the respondent Sai Group (Pty) Ltd, a company duly registered in terms of the company statutes of this country with its registered address at 220 Second Street, Rantjiespark, Midrand:

"2. The Respondent is ordered to forthwith and immediately restore the applicant's possession of the Jeep Cherokee with registration number [D...]by providing him

with the keys thereto and delivering the said motor vehicle to the Applicant to the new locks,·

3. That the Respondent is ordered to pay the costs of this application on attorney and- client scale."

[2] This application is opposed by the respondent. The respondent has delivered an opposing affidavit.

[3] The applicant's cause of action arose from the following circumstances. Since May 2016 and on the strength of a rental agreement he and the respondent had entered into, the applicant has been in peaceful and undisturbed possession of the motor vehicle with

registration letters and numbers [D...]("the motor vehicle"). On 6 May 2017 the respondent's representative, one

CEO Mr. Youshen forcefully dispossessed him of his peaceful possession. This motor vehicle constitutes the applicant's only means of transportation. He uses it to go to work and to take his minor child to school.

[4] On 6 March 2016 he visited the respondent's premises for a monthly inspection of the said motor vehicle. This was in accordance with the terms of the rental agreement concluded between the parties. The respondent admits that on 6 May 2016 the said motor vehicle was at his premises for the purposes of inspection. According to the applicant's testimony, a representative of the respondent stated that he has cancelled the rental agreement. He threatened to throw the applicant's wife and her fourteen month old baby out on the streets if she refused to get out of the motor vehicle. The said representative screamed at the applicant and his family and instilled fear into the whole family. A certain Youshen then forcefully took the keys of the motor vehicle from the applicants and ordered them off the premises.

[5] In its replying affidavit, deposed to by a certain Youshen Naidoo ("Youshen"), an adult businessman and the chief executive officer of the respondent contends that this application is not sufficiently urgent. He contends furthermore that the applicant has not been unlawfully deprived of possession of the said motor vehicle.

[6] The applicant, with regard to the urgency, testified that this being an application for spoliation, the application is therefore

inherently urgent. He used the said motor vehicle to go to work. It would appear on the papers that the said motor

vehicle is the only motor vehicle that the applicant uses. He is not in a position to hire

another motor vehicle as long as this case rages on. He tried his best to resolve this dispute and to avoid bringing this application by sending a letter to the respondent in which he had proposed an amicable solution to the matter. A copy of such letter is attached to his founding affidavit as 'TBM1'. But Lo and Behold! The respondent spurned the applicant's efforts to seek the least costly way of resolving this problem. The respondent failed to respond to the said letter. The said letter reads as follows:

"ATT: SAI FLEET

RE: MR T.B MATSIPE // YOURSELF // SPOLIATION

1. We refer to the above matter and confirm that our client attended the monthly inspection of his vehicle on 6 May 2016 at your premises.
2. He was informed that he had driven more kilometres as allowed in terms of the lease agreement and that he needed to make payment to yourselves in the amount of R26 500.00.
3. He tendered payment and requested your confirmation that he will be reimbursed in the amount in the event that he does not exceed the kilometres over the 3 year period
4. He was informed that the agreement is terminated right there and then in your boardroom, by one Mr. Youshen as such the CEO of SAI Fleet
5. We note that you have not taken the necessary action as per your agreement in terms of termination and or breach and or cancellation.
6. As such our client was accompanied to the vehicle as such, a Black Jeep Grand Cherokee, with registration number [D...], and told to remove his movables from the vehicle which includes his wife and 14 month bay, failing which the movables will be forcefully removed.
7. Our client was then threatened and screamed at, and to such an extent that his wife and baby begun crying and felt threatened.
8. The nett effect being that the CEO by way of Mr. Youshen then forcefully took the keys to the vehicle from our client and demanded our client to leave the premises.

9. Our client then took the Uber home.
10. As such your client spoliated our client who was in peacefully and undisturbed possession of the vehicle.
11. We therefore demand that the vehicle be returned to our client, who subsequently tender all further payments in terms of the agreement, and we record that our client is not in arrears in respect of any payment.
12. The vehicle to be returned by 09h00 tomorrow to our client's address as per the agreement attached hereto failing which our client will proceed with an urgent spoliation application and this application will be served on your office via email, unless you indicate another address.
13. We therefore await delivery of the vehicle by 09h00 tomorrow.

Kind regards

Esme Smith"

- [7] The court will, in making a court order, take the contents of the said letter or the efforts of the applicant in trying to resolve this matter amicably into account.
- [8] THE APPLICANT WAS NOT UNLAWFULLY DEPRIVED OF POSSESSION OF THE RELEVANT MOTOR VEHICLE

I now turn to investigate the circumstances under which it is contended by the respondent that the applicant was not deprived of the possession of the relevant motor vehicle. According to the testimony of the respondent on 6 May 2017 the applicant voluntarily made available to the respondent the vehicle for inspection by the respondent. This transpired not only in terms of the rental agreement but also in accordance with the applicant's conduct over the first twelve months of the rental period. The applicant arrived with the vehicle at the premises of the applicant between 11h00 and 12h00 for purposes of the monthly inspection of the vehicle. Prior to the applicant arriving Youshen was not pertinently aware of the fact that the applicant had booked the motor vehicle for an inspection on that particular day. Upon arrival the motor vehicle was received by the respondent's service advisor, one Shakeel Mahomed ("Mahomed"). The applicant left the motor vehicle and advised Mahomed that the vehicle's smart keys were in the vehicle. Accordingly the applicant left the vehicle and the key in the possession of Mahomed who then proceeded to inspect the vehicle. It is important to point out that according to his evidence it was necessary to have the possession of the motor vehicle and the key without which the inspection could be performed. It is common cause that the respondent performed the inspection. The respondent contends that it follows that possession of the vehicle was voluntarily relinquished by the applicant to the respondent.

- [9] As if the foregoing reason was not sufficient, the respondent had another bow to the string. It is

contended by the respondent that the applicant had excess kilometres. After the inspection of the vehicle, so it is testified by Youshen, Mahomed furnished the respondent's account's department with the kilometre reading of the vehicle, which at the time stood at 57141, and enquired from the accounts department whether there were any arrears in respect of any outstanding charge in terms of the rental agreement with the applicant. According to the respondent it is a normal procedure for a service advisor to make the necessary enquiries at the accounts department before reporting on the vehicle and before the vehicle will be released to a customer. The rental agreement provides for a mechanism should it be found that a particular customer is in arrears. In this respect the respondent relied on the provisions of clause 5.6 of the rental agreement. The said clause 5.6 reads as follows:

"5.6 Should SAIFLEET be of the reasonable opinion that the total kilometres stipulated in respect of any vehicle will be under or over-utilised by more than 20 % (twenty percent), which over-utilisation can be calculated at any time and from time to time, then the Customer will sign a restructured agreement when called upon to do so by SAIFLEET. The maximum period under any such restructure will be indicated by SAIFLEET to the Customer. The restructured agreement will be incorporated in this Agreement. The restructured agreement shall reflect a rental commensurate with the actual kilometres travelled by the vehicle."

Mahomed advised the accounts department that the vehicle had an excess of approximately 10 600 kilometres in relation to the time elapsed in terms of the rental agreement which was twelve months. In this respect the respondent relies on the provisions of clause 5.1 of the rental agreement in terms of which it had been agreed between the parties that the applicant would not exceed 30 000 kilometres in twelve months and that if he did so he will be liable to pay the excess kilometres. When the respondents confronted the applicant with the excess kilometres the applicant took the view that according to his understanding of the rental agreement, he would only be liable for any excess kilometres after the expiry of the full rental period of 3 years. Youshen then explained to the applicant that his understanding of the rental agreement was incorrect and that the excess kilometres clause provided for a charge on the excess kilometres on a monthly or twelve months basis. The applicant then offered to effect payment of the amount in arrears in respect of the excess kilometres by the end of May 2017, subject of course to a guarantee by the

respondent that he will be paid back the amount when after a period of three years the vehicle was still within the agreed limit of 90 000 kilometres. Again Youshen explained to the applicant that his suggestion was contrary to the terms of the agreement. He specifically explained to him that in terms of the rental agreement, if there is an excess in kilometres there is charge payable. That charge was according to the agreement not refundable at the end of the entire term or upon termination of the rental agreement.

[10] The respondent then raised another issue. Mahomed had reported to him that upon inspection of the vehicle he discovered that the tyres of the vehicle were worn out and needed immediate

replacement. The applicant then requested a copy of his invoice and Youshen furnished him with it. He further informed the applicant that the tyres on the vehicle were worn out and that they required immediate replacement. He reminded the applicant of the fact that the respondent, on a previous inspection, had warned the applicant that the tyres were almost worn out and needed to be replaced. According to Youshen the applicant ignored the advice. He then suggested that the tyres be replaced immediately and that the vehicle be returned to the applicant once the tyres were fitted and upon payment by the applicant of the excess kilometres as well as the costs of the tyres. The applicant agreed and advised that once he had received the invoices he would pay them immediately. Then the respondent presented the applicant with an invoice but the applicant refused to immediately pay for it. The applicant then suggested that he makes payment only at the end of May 2017. Youshen was not satisfied with the proposal. He sought immediate payment before releasing the vehicle to the applicant. The applicant then proceeded to threaten to take the respondents to court on the issue. Youshen told him that the respondent

was confident to defend the rental agreement in court but that the respondent would keep possession of the vehicle pending the

resolution of the dispute as it was entitled to do so in terms of the rental agreement. In this respect the respondent relied on the provision of clauses 13.4 and 13.5 of the rental agreement. Despite this the applicant persisted with his refusal to make immediate

payment. Clause 13.4 reads as follows:

"13.4 In the event of any breach of the terms and conditions of this Agreement, the Customer agrees that it will voluntarily surrender the motor vehicle to the possession of SAIFLEET, until such time that the dispute is resolved between the Company and the Customer."

And clause 13.5 reads as follows:

"13.5 In the event of any breach of this Agreement, the customer specifically waives any rights which may exist at that time pertaining to the Customer's possession of the vehicle."

[11] In conclusion the respondent states that he applicant was never deprived of his possession of the motor vehicle wrongfully or otherwise. According to the respondent the applicant voluntarily surrendered the vehicle to the respondent and persisted with his refusal to make payment to the respondent notwithstanding his obligations in terms of the rental agreement. The respondent

contends, this time as a fourth reason, that it was entitled to be in possession of the motor vehicle by virtue of the terms of the rental agreement as well as lien which the respondent was exercising in respect of the motor vehicle tyres.

Finally, the respondent contends that it employed the steps provided for in clause 13.1 of the rental agreement by sending an SMS to the applicant. In this SMS which was sent by the respondent on 17 May 2017, to the applicant, the respondent afforded the applicant 24 hours to remedy his breach of the agreement.

[12] It is contended by the respondent that after consulting with its attorneys of record on 22 May 2017, the respondent instructed such attorneys to address a letter to Steenkamp. The purpose of the said letter was aimed, inter alia, at cancelling the rental agreement and demanding payment of the outstanding monies.

[13] If a person has been deprived of possession by violence, fraud, stealth or some other illicit method, he may obtain from the Court a mandament of spolie or a spoliation order, in terms of which the dispossessor is commanded to restore possession to himself, in other words, the applicant. It is a fundamental principle of our law that no one shall resort to self-help. Consequently if a person, without being authorised by a judicial decree, dispossesses another person, the Court, without inquiring into the merits of the dispute, will summarily grant an order of restoration to the applicant as soon as he has proved two facts, namely, that he was in possession and that he was despoiled of such possession by the respondent. See in this regard the old authority of *Nino Bonino v De Lange* 1906 TS 120 at 122 where the Court had the following to say:

"It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the status quo ante, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute."

[14] It is not in dispute that:

14.1 the applicant was, on 6 May 2017, in peaceful possession of the aforementioned motor vehicle;

14.2 that the source or such a possession was a valid rental agreement he had concluded with the respondent;

14.3 that on 6 May 2017 he took the motor vehicle to the premises of the respondents only for a routine monthly inspection;

14.4 that on his arrival at the premises of the respondent was served by Youshen Naidoo, and;

14.5 that the respondent took possession of the said motor vehicle.

The question that this Court is called upon to decide is whether the applicant was dispossessed of his possession of the said motor vehicle, as he claimed, or whether, as it is claimed by the respondent, the applicant voluntarily surrendered possession of the said motor vehicle to the respondent on the said date. I also think that this Court must also decide whether or not the respondent had the right to retain possession of the said motor vehicle.

[15] Counsel for the applicant argued that the initial possession of the motor vehicle by the respondent was not denied; but that the entire conduct of the respondent

thereafter was nothing else but self-help. In support of this argument he stated that there was no reason for the applicant to launch this application if he had voluntarily relinquished possession. He then referred the Court to paragraph 10 of the case of *Anale Ngqukumba v The Minister of Safety and Security and Others* case number CCT8712013 ("Ngqukumba ") in which the court stated that:

"10. The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession of the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before or else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due processes. "

In *Sithofe v Native Resettlement Board* 1959(4) SA 115 WLD at 11 ("Sithole") 7 this is what the court had to say:

"The clear principle of our law is that, ordinarily speaking, persons are not entitled to take the law into their own hands to enforce their rights. There is a legal process by which the enforcement of rights is carried out. Normally speaking, it is carried out as a result of an order of court being put into effect through the proper officers of the law such as the sheriff, deputy sheriff, messenger of the magistrate's court or his deputies, reinforced if necessary, by the aid of the police or some such authority; in most civilised countries there exists the same principle that no person enforces his legal rights himself. For very obvious reasons that is so; if it were not so, breaches of the peace, for instance, would be very common. It is clear, therefore, that if you want to enforce a right you must get the officers of the law to assist you in the attainment of your rights. "

Furthermore it is submitted by counsel for the applicant that the application must succeed because the applicant has satisfied the requirements for a spoliation order. Finally, he pointed out that in the application the applicant was not asking for a declaratory order or any substantial right.

[16] He argued that the matter was urgent; that the applicant's attorneys wrote a letter to the respondent; that the respondent failed to respond to the said letter; and that the applicant used the motor vehicle to go to work and to take his minor child to school.

[17] On the other hand, counsel for the respondent argued that the application was not urgent. He submitted that the applicant has

failed to set forth explicitly the circumstances on the basis of which it was alleged that the matter was urgent and the reasons why the applicant claims that the applicant could not be afforded substantial redress at a hearing in due course. On

the question of the possession of the motor vehicle it was argued by the respondent's counsel that the applicant has not been unlawfully

deprived of possession of the said motor vehicle. He developed his argument and stated that the applicant voluntarily relinquished

possession of the motor vehicle to the respondent and that accordingly there was no spoliation. He submitted that once possession was lawful it can never be unlawful.

[18] THE MATTER IS NOT URGENT

The argument by the respondent's counsel is that the applicant has failed to set forth explicitly the circumstances which he averred rendered the matter urgent is, in my view, unmeritorious.

The applicant has done so. He has given three reasons why, according to him, the matter is urgent. In the first place he stated that the application is inherently urgent because the matter involves spoliation. This reason may not be a sound reason according to the respondent's counsel, but the fact of the matter is that, for the purposes of the application it is a reason. In arguing against this reason, counsel for the applicant relied on the case of *Mangala v Mangala* 1967(2) SA 415 E ("Mangala") where the Court held that it does not follow that, because an application is one for spoliation order, the matter automatically becomes one of urgency. It went further and held that the applicant must either comply with the rules of Court in the normal way or make out a case for urgency in accordance with the provisions of Rule 6(12)(b).

[19] What the said judgment means is that where the only reason advanced for urgency was that the application before the Court was for a spoliation order, this will not be enough to entitle

the applicant to the relief he seeks. It is not enough just to say 'this is a spoliation order application therefore the matter is urgent.' This was the case in *Mangala* supra. That this was so is evidently demonstrated by the following except from the same case:

"Mr. Mullins has urged us that, because this is an application for a spoliation order, the matter should automatically be treated as one of urgency. We are unable to agree with his view."

This ground, in combination with other grounds, may be sufficient to render the matter urgent.

[20]

Despite what the court stated in *Mangala*, it would appear from other authorities that that fact alone, that is the fact that it was

an application for a spoliation order, may ground an urgent application. That that is so is clear from some authorities where it

is stated that a person in the position of the applicant may by summary legal process known as mandament van spolie obtain immediate (my own underlining) restitution of possession without regard of his want of title. See in this regard *Mans v Loxton Municipality* 1948(1) SA 966 (C) at page 976. In this case, counsel for the defendants had contended that in our law as well as the English law the despoiled possessor may recover the article or property of which he has been despoiled

provided he acts forthwith (instantner) (my own underlining) and provided that in so doing does not commit a breach of the peace.

The court in that case had to deal with the construction that was placed on the words

"forthwith" or "instantner". According to Voet and the other authorities relied on by Van Winsen the person despoiled of his possession can forthwith - instantner-recover his possession. Voet had said the following in his title relating to possession. The possessor;

"Moreover he can resist all, who devise something against his possession by virtue of their own authority as if he has been thrown out of the possession, he can there and then reject his adversary, or otherwise demand by the interdict unde vi that before all things the possession be restored to him, even though he who was put out of possession were a thief or a robber. "

Referring to Digest 43.16.3-9 the court stated that:

"The ejectment must be forthwith and not after an interval. "

The Court in this case accepted the principle that recovery of something despoiled may take place "forthwith" or "instantner". I am not aware that the said case has been overruled. It also does not seem to me that it was drawn to the attention of the court in *Mangala*. But when one considers the principle that the court dealt with it is clear that by using the words "forthwith" or "instantner" it imports a sense of "urgency" or "without haste". In the result I agree that the fact that the application consists of an application for a spoliation order can be relied on as a factor. Accordingly, I find that the applicant was correct in holding that the matter was urgent because it was an application for a spoliation order.

[21] The other two grounds that the applicant relies on for urgency are that the said motor vehicle is his only means of transportation; he uses it to go to work and to take his child to school. These grounds are, in my view, persuasive. It goes without saying that if he is employed he uses the vehicle daily to go to work; he uses the motor vehicle daily to take his child to school. From the look of things he needs the motor vehicle desperately. The grounds on which he relies for urgency may not be enough to satisfy the counsel for the respondent. I am however satisfied that the matter deserved to be treated on an urgent basis.

[22]

THE APPLICANT WAS NOT DESPOILED OF POSSESSION OF THE MOTOR VEHICLE BUT HE VOLUNTARILY SURRENDERED IT TO THE RESPONDENT

The respondent has given two contrasting reasons why he took possession of the motor vehicle. In one instance the respondent contends that:

"It is significant to make mention of the fact that in order to do the inspection of the vehicle it is of course necessary to have possession of the vehicle and the key, without which, the inspection cannot be performed. It is common cause that the respondent performed the inspection. Accordingly, I respectfully state that it follows that the possession of the vehicle was voluntarily relinquished by the applicant to the respondent"

In another instance the respondent gives an impression that he purported to act in terms of clauses 13.4 and 13.5 of the rental

agreement. He states as follows:

"The applicant then proceeded to threaten to take the respondent to court on the issue. I told the applicant that the respondent is confident to defend the rental agreement in court but that the respondent would keep possession of the vehicle pending the dispute as tis entitled to in terms of the rental agreement. In this regard, I refer the honourable court to clauses 13.4 and 13.5 of the rental agreement. Despite this, the applicant persisted in his refusal to make immediate payment. "

In another instance he gives a further reason why he did not want to lease the motor vehicle or why he took possession of the motor

vehicle from the applicant. He states as follows:

"As already mentioned above the respondent is entitled to be in possession of the vehicle at present by virtue of the terms of the rental agreement as well as the lien which the respondent is exercising in respect of the vehicle for the tyres."

Finally he gives the fourth reason as follows:

"The respondent is not prepared to release a vehicle which is not roadworthy and which can affect the lives of, not only the applicant and his family, but also the public at large."

22.1 It follows that possession of the vehicle was voluntarily relinquished by the applicant to the respondent

This argument is, in my view, fallacious. The principle reason why the applicant took the motor vehicle to the premises of the respondent on 6 May 2017 was quite clearly, and this is not in dispute, to submit the motor vehicle for inspection. It is neither the applicant's case nor is it the respondents' case that the purpose of the presence of the

motor vehicle within the premises of the respondent on that particular day was to surrender possession of the motor vehicle to the respondent.

22.2 It was argued by counsel for the respondent that once possession of the motor vehicle was obtained lawfully it can never become unlawful. This argument is, in my view, somewhat skewed and lacks merit. I agree with the applicant's counsel that as soon as the respondent decided that he was not going to return the keys of the said motor vehicle to the applicant that constituted self-help. It is not the respondent's case that the applicant consented to the respondent keeping the keys of the motor vehicle. The applicant himself never testified that he agreed to the respondent keeping the keys of the motor vehicle. The fact that the keys of the motor vehicle were received lawfully from the applicant for the purposes of an inspection of the motor vehicle as the applicant was obliged to surrender the keys in accordance with the terms of the agreement, did not necessarily mean that the respondent could refuse to return the motor vehicle and its keys. I am satisfied that that amounted to self-help because the applicant did not consent to the respondent retaining the keys of the motor vehicle. See in this regard *Stocks Housing (Cape Pty Ltd) vs Chief Executive Director, Department of Education and Cultural Services and Others* 1996(4) SA 231 Cat 240 B-C where the court said:

"The element of unlawfulness of the dispossession which must be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of the spoliator to claim possession. The cardinal enquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be because It was by force or by stealth or deceit or by theft ... "

[23] THE RESPONDENT WAS ENTITLED IN TERMS OF CLAUSES 13.4 AND 13.5 TO KEEP POSSESSION OF THE MOTOR VEHICLE PENDING A DISPUTE

The respondent purported to act under the auspices of clauses 13.4 and 13.5 of the rental agreement. I pointed

out earlier what those clauses provide. The mere fact of stating in its evidence that:

"I told the applicant that ... the respondent would keep possession of the motor vehicle pending the dispute ... "

demonstrates that the respondent had resorted to self-help. This is the kind of conduct abhorred by Sithole Ngqukumba supra. At the pain of repetition clause 13.4 of the rental agreement provides that:

"In the event of any breach of the terms and conditions of this Agreement, the Customer agrees that it will voluntarily surrender the motor vehicle to the possession of SAIFLEET, until such time that the dispute is dissolved between the Company and the Customer. "

[24] In order to rely on the provisions of the said clause, the duty is cast upon the respondent to satisfy the Court that the customer "voluntarily" surrendered the motor vehicle to the possession of the company. In the first place, it is not the respondent's case that the applicant voluntarily surrendered the motor vehicle.

[25] The respondent says that he employed the steps set out in clause 13.1 of the rental agreement. This he did by sending, in terms of clause 13.1.1, an SMS on 17 May 2017:

"13.1 Should the Customer breach any of the terms and conditions of this Agreement or default in the punctual payment of any amount payable in terms thereof, or fail to observe or perform any of the terms, conditions and/or obligations cast upon it by this Agreement, or commit any act of insolvency, compromise or attempt to compromise with its creditors or be placed under provisional or final judicial management, sequestration or liquidation, or be placed under the business rescue, as the case may be, or suffer any default judgment against it to remain unsatisfied for a period of 14 (fourteen) days or fail during such period to apply for a rescission of/ or appeal against such judgment, or may have made any incorrect or untrue statement leading up to this Agreement, or do or cause to be done anything which may prejudice the rights of SAIFLEET hereunder or allow the vehicle to be seized under any legal process then SAIFLEET shall be entitled at its election and without prejudice to any of its other rights to:

13.1.1 Issue written notice in the form of a sms or text message providing the customer with 24 hours' notice to remedy such breach, failing which this agreement will be cancelled with immediate effect and SAIFLEET will be entitled to remotely immobilise the vehicle and recover same. Such recovery and administration costs associated therewith will be for the customer's account."

[26] Acting in terms of the provisions of clause 13.1, as it claims it did, was inconsequential. This is so because already even before it acted so it had cancelled the agreement between the parties; it had failed to give the applicant 24 hour notice to make any payment and finally, it already had taken possession of the motor vehicle.

[27] Finally, the respondent had acted unlawfully and in contravention of the provisions of clause 5.1 with regard to the amount in respect of the excess kilometres. It was contrary to the provisions of the said clause for the respondent to demand from the applicant and on the spot payment for the kilometres exceeded. Clause 5.1 states that:

"5.1 The total kilometres permitted to be driven on each vehicle provided to the Customer are 30000 kilometres per 12 month period or 2500 kilometres per month. Any kilometres driven in excess of the total kilometres shall be charged to the customer upon termination of the agreement, alternatively upon return of the vehicle, alternatively in the month following the month in which the customer exceeded the total kilometres permitted.

5. 2 The charge for the kilometres in excess of the total kilometres shall be R2.50 (Two Rand Fifty Cents) per kilometre.

5.6 Should SAIFLEET be of the reasonable opinion that the total kilometres stipulated respect of any vehicle will be under or over-utilised by more than 20% (twenty percent), which over-utilisation can be calculated at any time and from time to time, then the Customer will sign a restructured agreement when called upon to do so by SAIFLEET. The maximum period under any such restructure will be indicated by SAIFLEET to the Customer. The restructured agreement

will be incorporated in this Agreement. The restructured agreement shall reflect a rental commensurate with the actual kilometres travelled by the vehicle. "

Nowhere does the foregoing clause provide that the respondent shall demand payment of any amount in respect of the exceeded kilometres on the spot.

[28] Again clause 6.3 provides as follows:

"The Customer shall in any event remain liable for costs related to ordinary wear and tear such as but not limited to brakes, tyres, fuel, oil, windscreen and windscreen wipers. "

Appearances:

Counsel for the applicant:

Adv. L van Gas

Instructed by:

Steenkamp Attorneys

Counsel for the respondent: Adv. JF Pretorius

Instructed by:

SAI Group (Pty) Ltd

c/o Moodie Robertson Attorneys

Date Heard:

30 May 2017

Date of Judgment:

2 June 2017

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