

SOUTH AFRICA / JUDGMENT

Mokoshane and Others v Member of the Executive Council for the Department of Roads and Transport, Gauteng Provincial Department and Others
(2023/084551) [2023] ZAGPJHC 1021 (11 September 2023)
[2023] ZAGPJHC 1021

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

2023/084551

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IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023 – 084551

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the application by

PHOLOSIO MOKOSHANE 1st Applicant SBONGISENI ELVIS MKIZE 2nd Applicant SANDILE PHAKATHI 3rd Applicant NKANYISO MOLEFE 4th Applicant LAWRENCE FRANS TSEKELELE 5th Applicant LAURE LINDAU 6th Applicant MARSHALL CHINAME 7th Applicant TSHEPO BALOYI 8th Applicant TITOS NYERENGAI 9th Applicant METHULI MOYO 10th Applicant MPHOS SEAN BOKABA 11th Applicant PHENDULANI MSIYA 12th Applicant KHOTHATSO DAVID MOLEFE 13th Applicant MPHOS GIVEN MAWEYA 14th Applicant HLAMULO OWEN MABULANA 15th Applicant GEORGE SARKUWANZA 16th Applicant PARDON MANDIDA 17th Applicant GIVEMORE MAPHOSA 18th Applicant TEBOGO JUSTICE 19th Applicant SIYABONGA HLAZANE 20th Applicant XOLANI NKOSI 21st Applicant MICHAEL MOLEFE 22nd Applicant CLEVER MUPUNDIKO 23rd Applicant BOLT SERVICES ZA (PTY) LTD 24th Applicant and THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG PROVINCIAL GOVERNMENT 1st Respondent CITY OF JOHANNESBURG LOCAL MUNICIPALITY 2nd Respondent MINISTER OF POLICE 3rd Respondent NATIONAL COMMISSIONER: GAUTENG FOR THE SOUTH AFRICAN POLICE SERVICES 4th Respondent PROVINCIAL COMMISSIONER: GAUTENG FOR THE SOUTH AFRICAN POLICE SERVICES 5th Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Spoliation – requirements – unlawful deprivation of possession- second respondent's officers impounded vehicles used as taxi's that were not licenced as such – sections 50 and 87 of National Land Transport Act, 5 of 2009, to be read with Notice 1813 of 18 December 2019 – applicants not unlawfully deprived of possession by authorities

E-hailing taxis – not specifically regulated – classified as sub-category of metered taxis used for charter services – National Land Transport Act - sections 66 and 67

Order

[1] In this matter I make the following order:

1. By agreement between the applicants and the second respondent the application is withdrawn as against the second respondent and the applicants are ordered to pay the second respondent's wasted costs;
2. The application as against the remaining respondents is dismissed;
3. The applicants are declared to be liable, jointly and severally, the one paying the other to be absolved, for the costs of the first respondent.

[2] The reasons for the order follow below.

Introduction

[3] This is a spoliation application. The first respondent impounded Bolt Bajaj vehicles in the possession of the applicants and the applicants approached the court on the basis that they were unlawfully deprived of possession of the vehicles by the officers of the first respondent, the Member of the Executive Council for the Department of Roads and Transport in Gauteng.

The applicants also sought relief against the second respondent, the City of Johannesburg but this application was withdrawn with a tender of costs.

[4] The mandament van spolie originated in the canon law.[1] The remedy was described in the following terms by Van Blerk JA in *Yeko v Qana*: [2]

“The fundamental principle of the remedy is that no one is allowed to take the 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.”

[5] As will be shown below, the applicants cannot prove that they were unlawfully ousted and the application must fail.

Urgency

[6] The notice of motion is dated 23 August and the founding affidavit was signed on 25 August 2023. The applicants (whose names were initially withheld in the papers filed on Caselines because they say that they fear intimidation by metered taxi drivers[3]) say that on 17 and 18 August 2023, eleven Bolt Bajaj vehicles in their possession were seized and impounded by SA Police Service

(SAPS) officers and Johannesburg Metropolitan Police Department (JMPD) officers and officials. The vehicles belong to a company by the name of MyNextCar and provided to the applicants in terms of a subscription agreement.

The applicants say that the vehicles are roadworthy and have valid roadworthiness certificates. However the confirmation from the authorities referred[4] to as “FA3” is not attached to the papers. There is a copy of a certificate issued by the National Regulator for Compulsory Specifications[5] confirming that the requirements of the application for the homologation of Bajaj Qute Oscar vehicles were met on 5 April 2017.[6]

[7] The applicants demanded the immediate return of the vehicles on Sunday, 20 August

2023. Receipt was acknowledged on Monday the 21st. A further eleven[7] Bolt Bajaj vehicles were impounded on 22 August 2023. The vehicles are used for commercial purposes, namely transporting fare-paying passengers. The applicants allege that while the vehicles are impounded they are precluded from earning a living and that this fact renders the matter urgent.

[8] The application was served between 25 and 28 August 2023.[8] The notice of motion calls on the respondent to give notice of intention to oppose on the 24th (the day before service commenced) and more importantly called on the respondents to file answering affidavits by close of business on the 25th.

[9] I find that the application for a mandament of spolie on the facts as set out by the applicant to be sufficiently urgent to deal with in the Urgent Court.[9] The more fundamental disputes between the parties relate to the classification of e-hailing operators in the public transport arena

and can not be dealt with in this application and on the facts set out in the affidavits. I deal with these aspects only in the context of the question whether the applicants were unlawfully deprived of possession.

The first respondent's opposition

[10] The first respondent filed an answering affidavit and opposed the application. The deponent informs the court that the first respondent is prejudiced by the very short notice in that he had to rely on input from others in the organisation but was unable to obtain confirmatory affidavits on such short notice.

[11] The deponent confirms that the vehicles would be returned upon payment of an impoundment fee of R3,500 and a fine of R1,500 for operating the vehicles illegally.[10] They would be permitted to operate the vehicles if and when they were in possession of valid operating licences.

[12] The applicants were using the vehicles in contravention of section 50 of the National Land Transport Act, 5 of 2009. The section reads as follows:

“50 Regulation of road-based public transport

- (1) No person may operate a road-based public transport service, unless he or she is the holder of an operating licence or a permit, subject to sections 47, 48 and 49, issued for the vehicle concerned in terms of this Act.
- (2) An operating licence may authorise the vehicle to which it relates, to operate more than one service or type of service.
- (3) Where an application in connection with an operating licence concerns services provided for in an integrated transport plan, the provisions of that plan, where appropriate and where possible, will dictate the decision of the entity considering the application.”

[13] The applicants have not applied for operating licences and the possession of operators’ cards issued by the Traffic Department of the second respondent which is a business licence must not be equated with an operating licence to use the vehicles for commercial purposes in terms of section 50 of the Act.

[14] In terms of section 87 of the Act the first respondent was therefore justified in impounding the vehicles. The relevant sub-sections read as follows:

“87 Impoundment of vehicles

- (1) An authorised officer who is satisfied on reasonable grounds that a motor vehicle is being used by any person for the operation of public transport without the necessary operating licence or permit or contrary to the conditions thereof, may impound the vehicle pending the investigation and prosecution of that person for an offence mentioned in section 90
- (1) (a) or (b).
- (2) A vehicle impounded under subsection (1) must be delivered to the head of the depot contemplated in subsection (4), who must retain the vehicle in the depot and release it to the person concerned only-

(a)when the criminal charges against the person have been withdrawn or the person has been acquitted of the offence charged; or

(b)in the case where the person is convicted of the offence charged, and unless the court has ordered otherwise, on payment to the head of the depot of the amount determined by the MEC, which is an impoundment fee.”

[15] The Bolt Bajaj vehicles are used for e-hailing taxi services. E-hailing is a relatively new concept that became prominent in the public consciousness Worldwide through the activities of the firm by the name of Uber. E-hailing enables customers to hail a taxi by electronic means, typically a cell phone. The computer program links the customer with a taxi and has the facility to estimate distances and travel time thus making it possible to provide the customer with a quote when he or she enters the taxi.

[16] The regulatory regime does not provide for the licensing of e-hailing operators and these operators are currently licenced as a sub-category of metered taxi operators.[11] The Department of Transport informed role players of its policy in a comprehensive circular already on 25 February 2015. The Department is of the view that e-hailing services fall within the definition of a charter service as defined in section 1 and described in section 67 of the Act, and that e-hailing serves the purpose of the meter in a metered taxi.

A taxi used in the provision of an e-hailing service is available for hire by hailing while roaming and may stand for hire at a rank just like a metered taxi, but unlike a metered taxi is not equipped with a sealed meter for the purpose of determining the fare payable.[12] This function is carried out electronically by computer software.

[17] The applicants argue that because e-hailing services are not specifically regulated, their vehicles can not be impounded under section 87 of the Act. I do not agree. In the absence of specific regulations or an amendment to the Act to include the regulation of e-hailing services, the authorities are entitled to use the applicable legislation that is at their disposal.

The vehicles that were impounded are clearly taxis in the ordinary meaning of the word in that they are vehicles used to convey fare-paying passengers over land. The policy and the circular have not been set aside on review.

[18] The applicants were not unlawfully deprived of possession. The first respondent and its officers acted within the limits of their powers to confiscate the vehicles.

[19] The applicants point out that the officers who confiscated the vehicles were called upon to exercise a discretion in doing so. It is neither possible nor necessary to analyse the discretion analysed by the officers who impounded the vehicles.

The second respondent's opposition and the withdrawal of the application as against the second respondent

[20] The second respondent filed an answering affidavit[13] in which the City of Johannesburg denied any involvement in the matter. The vehicles were not impounded and were not in the possession of the second respondent. On the list attached to the founding papers by the applicants only one vehicle is reflected as impounded by the second respondent.

[21] The applicants withdrew the application as against the second respondent and tendered its wasted costs.

Conclusion.

[22] For these reasons I make the order in paragraph 1 above.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 11 SEPTEMBER 2023.

COUNSEL FOR APPLICANTS: Z RAQOWA INSTRUCTED BY: DLA PIPER (SOUTH AFRICA) (RF)
INC COUNSEL FOR FIRST RESPONDENT: T K MLAMBO INSTRUCTED BY: STATE ATTORNEY
COUNSEL FOR SECOND RESPONDENT X D MATYOLO INSTRUCTED BY: MALEBYE MOTAUNG
MTEMBU INC DATE OF ARGUMENT: 31 AUGUST 2023 DATE OF JUDGMENT: 11 SEPTEMBER 2023

- [1] Kleyn 'Possession' in Zimmermann & Visser (eds) Southern Cross-Civil Law and Common Law in South Africa (1996) 835 – 46, referred to with approval by Cameron JA the Supreme Court of Appeal in Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others 2007 (6) SA 511 (SCA) para 21.
- [2] Yeko v Qana 1973
- (4) SA 735 (A) 739G. See also Blendrite (Pty) Ltd and Another v Moonisami and Another 2021 (5) SA 61 (SCA) paras 6 to 8.
- [3] It is common cause on the papers that there is friction in the taxi industry between the different branches of the industry. These branches compete for clientele and regulation takes place in the interest of public safety.
- [4] Founding affidavit para 44, Caselines 01-32,
- [5] Caselines 02-217.
- [6] Under homologation reference number SO:78132.
- [7] The total should be 22 and a list of 22 vehicles is annexed to the papers, but it is stated in the affidavit that 23 vehicles were impounded. Of the 22 vehicles on the list, only one is shown as having been impounded by the second respondent.
- [8] Service affidavits, Caselines 07-1.

- [9] See Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004
- (2) SA 81 (SE), East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd 2011 JDR 1832 (GSJ) para 9, and South African Informal Traders Forum and Others v City of Johannesburg and Others 2014 (4) SA 371 (CC) para 37.
- [10] See Notice 1813 of 18 December 2019.
- [11] See section 66 of the Act.
- [12] See the definition of a metered taxi service in section 1 of the Act.
- [13] Caselines 08-6.
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