

SOUTH AFRICA / JUDGMENT

Nowete Transport (Pty) Ltd v Kanjee and Others (M33/2021) [2021] ZANWHC 74 (18 February 2021) [2021] ZANWHC 74

COURT

North West High Court, Mafikeng

BEFORE

MTEMBU

CASE / FILE NUMBER

M33/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

Case

No: M33/2021

Reportable:

NO

Circulate

to Judges: NO

Circulate

to Magistrates: NO

Circulate

to Regional Magistrates: NO

In

the matter between:

NOWETE
TRANSPORT (PTY) LTD
Applicant
And
B
KANJEE
First Respondent
MLMOENG
Second Respondent
GNAGE
Third Respondent
TH
LETLAKU
Fourth Respondent
REASONS
FOR JUDGMENT
MTEMBU
AJ

[1]

The main application revolved around the Mandament van Spolie. Applicant sought the restoration of undisturbed possession of buses. In contrast, the Respondents in their counter-application sought an order placing the applicant under final winding up. The respondents also contended that this Court lacks jurisdiction in respect of the four (4) out of five (5) dispossessed buses, on the basis that the alleged act of spoliation occurred in Brits, which does not fall within the geographical area of this court. Therefore, this Court was asked to deal with three issues which are: (i) jurisdiction, (ii) spoliation, and (ii) winding up.

[2]

This matter was before me on 21 January 2021. I reserved the judgment. The judgment in this matter was delivered on 18 February 2021.

[3]

On 15 March 2021, the respondents filed a request for reasons for judgment. On 17 March 2021, the respondents also filed an application for leave to appeal. In the application for leave to appeal, the respondents state that they reserve a right file further grounds of appeal upon receipt of the reasons for judgment.

[4]

What baffles me in this matter is the request for reasons for judgment, since a Court's Order with full reasons was handed down in this matter. The reasons for judgment may only be requested, if no full reasons for the Court's order were provided. For ease of

reference, I attach hereto a copy of the judgment delivered on 18 February 2021.

[5]

There are no further reasons for the judgment that I can provide in this matter. I can only entertain an application for leave to appeal, once it is properly set down on a date arranged by the registrar.

A.M.

MTEMBU

ACTING

JUDGE OF THE HIGH COURT

NORTH

WEST DIVISION, MAHIKENG

The

reasons for judgment were electronically emailed to the parties. The 15th September 2021 is deemed to be the date of delivery of these reasons for judgment.

NORTH

WEST PROVINCIAL DIVISION,

MAHIKENG

Case

No.: UM33/2020

In

the matter between:

B

KANJEE

First Respondent

MLMOENG

Second Respondent

G

NAGE

Third Respondent

TH

LETLAKU

Fourth Respondent

JUDGMENT

INTRODUCTION

- [1] The main application revolves around the Mandament van Spolie. Applicant seeks the restoration of undisturbed possession of buses. In contrast, the Respondents in their counter-application seek an order placing the applicant under final winding up. The respondents also contend that this Court lacks jurisdiction in respect of the four (4) out of five (5) dispossessed buses, on the basis that the alleged act of spoliation occurred in Brits, which does not fall within the geographical area of this Court. Therefore, this Court is asked to deal with three issues which are: (i) jurisdiction, (ii) spoliation, and winding up.

JURISDICTION

[2] During argument, I enquired from Mr Scholtz, who appeared on behalf of the respondents, whether the issue of jurisdiction was still in dispute. The answer was affirmative. Mr Scholtz submitted that this Court lacks jurisdiction to entertain a dispute as it relates to an alleged act of spoliation that occurred in Brits. Mr Scholtz contended that the cause of action arose outside the jurisdiction of this Court. While contending so, he however conceded that all the respondents reside within the jurisdiction of this Court. The respondents have also kept possession of the dispossessed buses within the jurisdiction of this Court. Therefore, on the basis

of this concession, I find Mr Scholtz's submissions without merit.

[3] Section 21 of the Superior Courts Act 10 of 2013 and its statutory predecessors determine that a division of the High Court 'has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction. It is trite that the phrase 'in relation to all causes arising' has been interpreted to refer to proceedings in which the court has jurisdiction under the common law, with the result that a court's jurisdiction is determined by reference to the common law or any relevant statute (*Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk* 1963 (2) SA 10 (T) at 17G; *Bisonboard Ltd v k Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA482 (A) at 486H- J).

[4] Under the common law, the doctrine of effectiveness is the basic principle of jurisdiction. The essence of this doctrine is that a court will only have jurisdiction to adjudicate on a matter if its order will be effective (*Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liquidation)* 1987 (4) SA 883 (A) at 893F).

[5] In *Bisonboard Ltd v K Braun Woodworking Machine (Pfy) Ltd* [1990] ZASCA 86; 1991

(1) SA 482 (A) at 499F, the Appellate Division held that the nature of the inquiry into whether a court has jurisdiction 'is a dual one: (1) is there a recognised ground of jurisdiction; and, if there is, (2) is the doctrine of effectiveness satisfied - has the Court power to give effect to the judgment sought? See *Hugo v Wessels* 1987 (3) SA 837 (A)'

[6] The then Appellate Division further held that if the defendant is either domiciled or resident in the area, this will be a sufficient jurisdictional connecting factor. See *Bisonboard Ltd* at 488B

[7] In *Forbes v Uys* 1933 TPD 362 at 369, the Court held that:

"The guiding principle is that our Courts will not exercise jurisdiction unless effect can be given to the judgment, and there is nothing to prevent the Court giving effect to a judgment for damages where the Defendant is resident within its jurisdiction." [My Emphasis]

[8] As stated above, it is common cause that both the applicants and the respondents reside within the jurisdiction of this Court. It is also common cause that the spoliated property is kept within the jurisdiction of this Court. Therefore, the respondents' domicile or residence in the jurisdiction of this Court is a sufficient jurisdictional connecting factor. See *Bisonboard Ltd* at 4888. For these reasons, I see no reason why the effect cannot be sufficiently given to the judgment.

[9] Accordingly, the respondent's point in limine on jurisdiction must fail.

MANDAMENT VAN SPOLIE

[10] This Court is enjoined to consider the granting of the relief sought only if the facts alleged on behalf of the applicant which are admitted by the respondent in the answering affidavit, together with the facts expressed by the respondent therein, justify such relief.[1]

[11] The requirements of the mandament van spolie are well-known, and require no exclusive exposition for present purposes. There is also abundance of authorities on the subject matter.

[12] In order to succeed with an application for spoliation, an applicant must allege and prove that he or she was in peaceful and undisturbed possession of the property or right.

[13] *Mhlantla JA in IVANOV v NORTH WEST GAMBLING AND OTHERS 2012*

(6) SA 67 (SCA) at para 19, held:

"Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant - that is why a thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute. "

[14] 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.[2]

[15] In *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. "

- [16] In this matter, it is common cause that the applicant has three directors, namely: Nkonzinlile Malakia Maseko ("Masako"), Phefane Johannes Mahlonoko ("Mahlonoko"), and Matshidiso Esterlina Thusi ("Thusi"). The applicant is in a business of provision of bus transport services to school learners in the rural community in the North West Province. The applicant owns a number of buses. It has been in possession of these buses for a considerable period of time. The respondents are also shareholders of the applicant. The respondents had not been paid dividends for a number of years. The non-payments thereof caused a disgruntlement amongst the respondents.
- [17] It is undisputed that the applicant's buses was dispossessed by the respondents. What remains in dispute is whether the dispossession was unlawful or not. The respondents contend that there was no unlawful dispossession. The respondents contend that in May 2019, Mahlonoko entered into an oral agreement with the respondents in that the buses would be provided to the respondents so that they could use them for their own financial gain to compensate for the loss of dividends owed to them.
- [18] It is also common cause that these buses were dispossessed by the respondents on different dates and at different locations. One of the buses was taken from one of the directors, Maseko, and others were taken from the applicant's drivers.
- [19] The applicant, in an attempt to regain possession, laid a criminal complaint on 03 October 2019 against the respondents. The applicant also brought an urgent application on 01 November
2019. However, the said application was struck from the urgent roll due to lack of urgency. The parties convened a meeting on 10 January 2020, but this meeting never yielded any positive results.
- [20] The applicant alleges that it is entitled to the relief claimed because, at all times material hereto, it had peaceful and undisturbed use and enjoyment of the buses. The respondents' action, in taking the buses, was unlawful, so the applicant contends, because it amounted to self - help.
- [21] Mr Scholtz, on behalf the respondents, submitted that from the perusal of the papers, there is a massive factual dispute of facts regarding whether the buses had been provided to the respondents by agreement or whether the respondents spoliated the applicant from its possession of the buses. The respondents contend that this factual dispute cannot simply be resolved on papers, and as such this calls for dismissal of the spoliation application. I do not think that the dispute of fact is such that this Court is disempowered to make a determination whether an act of spoliation occurred or not. In my view, there are material facts which are not in dispute. Such facts are able to empower this Court to make a determination whether spoliation occurred or not. It is undesirable for a court to take all disputes of fact at their face value, otherwise a respondent litigant would just raise fictitious disputes of fact and thus delay the hearing of the matter to the prejudice of the applicant.[3]

[22] The material facts which appear not to be disputed are that on 15 May 2019, one of its directors was approached by the respondents accompanied by a group of 15 to 20 persons who aggressively demanded the keys to the bus with registration number FOB 208 NW. Fearing for his life, the applicant's director surrendered the keys. On 11 September 2019, the applicant's employee, in his capacity as a driver, was approached by the respondents accompanied by a group of 7 persons and aggressively demanded the delivery of the keys to the bus. The said employee contacted the applicant's director, Maseko, whether he should hand over the keys. Maseko advised the employee not to hand over the keys. However, fearing for his life, he had no choice but to surrender the keys. The other drivers were approached in a similar way by the respondents accompanied by a group of 7 persons who aggressively demanded the keys to the buses, and these employees fearing for their lives surrendered the keys. These versions are undisputed except for a mere bare denial by the respondents, without a version addressing these serious allegations. It is trite that a respondent in motion proceedings is required in the answering affidavit to set out which of the applicant's allegations, he admits and which he denies, and to set out his version of the relevant fact. A failure to deal with an allegation by the applicant amounts to an admission. [4]

[23] Most importantly, it is also undisputed that the applicant, in an attempt to regain possession, laid a criminal complaint on 03 October 2019 against the respondents. The applicant also brought an urgent application on 01 November 2019, which was struck from urgent roll due to lack of urgency.

[24] Therefore, on these facts as set out above, I am satisfied that indeed an act of spoliation was committed.

[25] Another important factor for consideration is that, assuming that there was an oral agreement as alleged, but the moment the applicant reneged or changed its mind in relation to the handing over

the buses, the respondents were precluded from enforcing that agreement on their own, as such conduct would amount to self-help.

[26] I will now deal with the alleged disputes of fact. In regard to determining factual disputes in motion proceedings, the judgment of Harms DP in *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009

(2) SA 277 is of relevance, particularly at paragraph [26]:

"Motion Proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of facts arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the

latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers" (my emphasis).

[27] It is common cause that Mahlonoko acts on behalf of the applicant by virtue of having deposed to confirmatory affidavit in his representative capacity of the applicant. Mahlonoko disputes the alleged oral agreement. Of significance, even if there was such an agreement, the respondents categorically state that the alleged contract was entered into with Mahlonoko. Mahlonoko is not the applicant, but one of the applicant's directors. There is no allegation by the respondents in their answering affidavit that Mahlonoko entered into an oral agreement on behalf of the applicant. The respondents repeatedly state in their answering affidavit that an oral agreement was entered into with Mr Mahlonoko.

[28] Evidently, there is no resolution by the applicant nor board minutes attached to the respondents' answering affidavit in support

of the alleged oral agreement. No allegations as to where the alleged oral agreement was entered into.

[29] What baffles me is that Mahlonoko is accused of being in flagrant breach of his fiduciary duty towards the applicant and its shareholders. The respondents allege that Mahlonoko indicated that they will never have insight into the applicant's bank account. The respondents, as minority shareholders, have been oppressed at the behest of Mahlonoko. Yet, the same person is alleged to have given the respondents a permission to take over the buses. I find the respondent's version contradictory in this regard. It consists of

nothing else but bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that this Court is justified in rejecting them merely on the papers.[5]

[30] What also triggers perplexity is that, there is no reason or explanation why the respondents would be accompanied by a massive group of persons, if indeed there was an agreement between the parties. Again, there is no reasonable explanation why the buses were taken on different dates and at different locations, if indeed, there was an oral agreement as alleged. One would assume that such delivery would be properly coordinated, and not in a haphazard way, as it was the case in this matter. There is no reasonable explanation as to why the buses were not orderly delivered by the applicant to the respondent, as opposed to the dispossession by the respondents. This can only happen, in the absence of agreement between the parties.

[31] In my view, there was also no need for the respondents to be accompanied by a group of persons of more than seven (7), in some instance more than 15, if the intention was not to resort to self-help. There was no need for the applicant to lay a criminal complaint against the respondents, in an attempt to regain possession, if an act of spoliation was not committed.

[32] Accordingly, I am satisfied that despite denials by the respondents, no real, genuine or bona fide dispute of fact can be said to have been created.

WINDING UP

[33] The respondents in their counter-application seek an order that the applicant be placed under final winding up. The respondents allege that the applicant denies them access into the affairs of the organisation. This refusal, the respondents contend, boils down to an oppression of the minority shareholders. The respondents allege that the applicant appears to be in financial distress. The respondents therefore contend that it would be just and equitable for the company to be wound up. The applicant denies that it is in financial distress. It contends that it owns a number of properties which make it to be in a sound financial position. It however contends that the unlawful dispossession has resulted in it experiencing financial problems. The applicant contends that liquidation proceedings are inappropriate for resolving disputes regarding the actions of its directors and that the respondents should rather follow the statutory remedies available to them in terms of the Companies Act.

[34] During the hearing of argument, I brought it to the attention of Mr Scholtz that the winding up application appears to be defective

in that the statutory requirements were not complied with, in particular the service of the application on the preferent creditors

such as the applicant's employees. Mr Scholtz conceded to this effect. The applicant's employees were neither served nor made aware

of this winding up application.

[35] In regard to the statutory requirements, section 346(4A) of the Companies Act of 1973 provides that:

'(4A)(a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application-

(i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and

(ii) to the employees themselves-

(aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or

(bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;

(iii) to the South African Revenue Service; and

(iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph

(a) was complied with.'

[36] Notwithstanding the repeal of the 1973 Companies Act, these provisions remain in force, by virtue of the provisions of s 9 of Schedule 5 to the Companies Act 71 of 2008.

[37] In *Standard Bank of SA Limited v Sewpersadh and Another* 2005 (4) SA 148 (C) on 156 B - D where Dlodlo J held"

"It is clear from the above that the Legislature used the word 'must' and did not use 'may'. The furnishing of copies of the application to the Commissioner for Inland Revenue, the employees and trade unions was therefore made peremptory (obligatory) and not permissive. (See *Berman v Cape Society of Accountants* 1928

(2) PH M47 (C).) The word 'must' was also used by the Legislature in defining the obligation of the petitioner as far as proof of service is concerned. The applicant was left with no option of filing an affidavit. It was necessary to do so."

[38] Section 346(4A) requires that the application papers be furnished to various people, namely, every registered trade union that represents the employees; the employees themselves; SARS and the company itself.

[39] The Court cannot condone non-compliance with section 346 (4A) and section 346A, as these provisions are peremptory. See *Hendricks NO v Cape Kingdom (Pty) Ltd* 2010

(5) SA 274 (WCC).

[40] There can be little doubt that the section imposes an obligation on the applicant to furnish the application papers to the persons named in the section. That accords with the section's purpose. The section states that the application papers 'must' be furnished to the named persons. It is therefore peremptory. *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* (979/2012) [2013] ZASCA 167; [2014] 1 All SA 294 (SCA)

[42] Where the status of an entity is involved, it will even be more important to ensure that the respondent, its employees and the trade union are informed of the winding up proceedings.

[42] As stated by Blieden J in the unreported case of *Peter Wayne Roberts v The Taylor of Buckingham CC* Case No 2008/21864 (supra), and endorsed by PRETORIUS J in *Lak Investment Company No 26 (Pty) Ltd v Pressure Advance Technology CC* (55018/2011) [2014] ZAGPPHC 59 (20 February 2014:

"... The application for winding-up, when it was lodged with the Registrar, required that the applicant at that time complied with the

requirements of subsection 346 (4A). Had the court been aware that there had been no such compliance the matter would have been struck off the roll. The fact that the matter has now been fully argued does not change the position. The application should not have been heard in the first place. It was not properly before the court "

[43] In this matter, it is common cause that there was no service effected on the applicant's employees. The applicant did not comply with the provisions of section 346 (4A) (a)(i) and (ii) or section 346 (4A)(iv), pertaining to service on the employees or the trade union.

[44] Therefore, a court cannot grant an order winding up a company, whilst it is common cause that the requirements of section 346(4A) have not been met, namely to, as far as reasonable, inform the employees and/or trade unions of the application.

[45] Another issue for consideration is non-compliance with section 346(4A) (b). What is clear from section 346(4A) (b) is that whoever furnishes the application on any of the parties referred to in the section, must depose to an affidavit which sets out the manner in which section 346(4A)(a) was complied with. The respondents duly served the Master of High Court and SARS as evident from the filling sheet of the Notice of Motion, which bore the stamps of the Master and SARS. However, there was no affidavit from the person who has so furnished SARS with a copy of the application.

[46] WALLIS JA in *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* (979/2012) [2013] ZASCA 167; [2014] 1 All SA 294 (SCA), at para 22, stated that:

"In order for the court to perform this function properly it will be necessary for applicants, in the founding affidavit or the affidavit in terms of s 346(4A)(b), to deal with whether the respondent has employees and if so where those employees are working or are likely to be found. It is only in the light of this information that the court hearing the application can decide whether there has been compliance with the requirements of the section. If there is reason to believe that the respondent does not have employees then this and the grounds for it must be stated."

[47] It follows from the above authorities that the respondents' application is fatally defective.

[48] This Court is therefore unable to perform its function properly as set out in the *EB Steam* judgment.

- [49] No overwhelming case is made on the papers for the granting of a provisional winding-up order or that any delay will allow assets to be concealed or disposed of to the detriment of the general body of creditors and particularly the employees and SARS, who may have preferential claims. All what the respondents are alleging is that the applicant is oppressive and therefore, it would be just and equitable for the company to be wound up.
- [50] Accordingly, the application for the winding-up of the respondents falls to be struck off the roll.

COSTS

- [51] What remains is the question of costs. The general rule is that costs follow the result. Nothing emerges from this matter warranting a deviation from this principle.

ORDER

[52] Therefore, I made the following order:

- (i) The respondents are directed to restore with immediate effect the possession and control of the following buses to the applicant:
 - a. MAN Explorer Heavy Passenger Bus with registration number FDB208NW;
 - b. MAN Explorer Heavy Passenger Bus with registration number FPB347NW;
 - c. c MAN Explorer Heavy Passenger Bus with registration number FPB343NW;
 - d. MAN Explorer Heavy Passenger Bus with registration number FSS170NW; and
 - e. MAN Explorer Heavy Passenger Bus with registration number FPB336NW.
- (ii) The respondents are ordered to pay the costs of this application.
- (iii) The winding up application is struck off the roll with costs.

APPEARANCES

DATE OF HEARING

21 JANUARY 2021

DATE OF JUDGMENT

18 FEBRUARY 2021

COUNSEL FOR THE APPELLANT ADV. J.A.H MAY

COUNSEL FOR THE RESPONDENT ADV H.J SCHOLTZ

- [1] PLASCON EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD (1984) ZASCA 51; 1984 (3) SA 623 (A) 634-635.
- [2] Willowvale Estates CC and Another v Bryanmore Estates Ltd 1990 (3) SA 954 (W) at 956 D-1

- [3] Peterson v Cuthbert & Co Ltd 1945AD 420 at 428
- [4] Freedom Under Law v National Director of Public Prosecution and Others 2014 (1) SA 254 (GNP), para 208
- [5] Freedom Under Law v National Director of Public Prosecution and Others 2014 (1) SA 254 (GNP), para 208
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