

SOUTH AFRICA / JUDGMENT

Xaba v Mthethwa and Another (42212/21) [2021] ZAGPPHC 724 (3 November 2021)

[2021] ZAGPPHC 724

COURT

North Gauteng High Court, Pretoria

BEFORE

Maumela

CASE / FILE NUMBER

42212/21

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(NORTH GAUTENG HIGH
COURT, PRETORIA)

Case

No: 42212/21.

(1) REPORTABLE:

YES / NO.

(2) OF INTEREST TO

OTHER JUDGES: YES / NO.

(3) REVISED.

DATE: 03 November 2021

SIGNATURE

In

the matter between:	Nosipho Thobekile Xaba Applicant and Mbali Adelaide Mthethwa First Respondent Ntombizodwa Mthethwa Second Respondent
Summary:	Applicant seeks a spoliation order - Mandament van spolie application - Undisturbed possession of the property - Unlawful and forceful removal - Possession ordered to be restored - Return to the status quo ante omnia ordered.

JUDGMENT

Maumela J.

1. This case came before this court in the Urgent Roll. The Applicant seeks an order in the following terms:
 - 1.1. That the matter be dealt with as one of urgency in terms of Rule 6(12) of the Rules of this Honourable Court and that the normal High Court Rules relating to applications be dispensed with and that insofar as the Applicant has not complied with the Rules of this Court, that her failure to do so be condoned;

That both Applicant and Respondents are directed to ensure joinder of Johannesburg-Tembisa Taxi Association (“JTTA”) and/or other parties affected by the decision of the JTTA or a non-joined party in this suit.

 - 1.2. That the Respondents are directed to allow Applicant access to view or inspect the vehicles that are subject to dispute, within convenient and reasonable periods of the day.
 - 1.3. That no order as to costs be made.
2. In essence, the Applicant seeks a spoliation order. She submits that by its mere nature; an application for a spoliation order comes urgent. She submitted that she was in possession of and in undisturbed possession of the property which is the subject of this application when she was unlawfully and forcefully removed from possession by the Respondents.

3. In this case, the court has to determine whether the Respondents are to be ordered to restore possession to the Applicant, or whether the Respondents have advanced a good defence in opposition to the application for spoliation. Applications for mandament van spolie stem from a common law remedy which exists to protect possessors against unlawful and forceful dispossession. This remedy prohibits citizens from taking the law into their hands.

4. In order to succeed, the Respondents to an application for mandament van spolie have to raise one of the following defences:

4.1. Firstly, either that they did not commit the act alleged by the Applicant or

4.2. Secondly, that if they did remove the Applicant from possession; the said dispossession was not unlawful but was authorized by law.

5. In their answering affidavit, the Respondents admit that they did remove the vehicles in issue from the Applicant's undisturbed possession and that they took the said vehicles to another place for safe keeping. They aver that the Applicant consented to the removal of such property. The Applicant denies that she agreed to the removal of the vehicles. She argues that without a court order authorizing the Respondents to remove the vehicles, such removal ought to be found to be unlawful and forceful.

6. It is trite that applications for mandament van spolie do not involve considerations of ownership or title. All the court has to find out is whether the applicant was in peaceful possession

of the object in issue and whether unlawful and forceful removal from possession took place. Once the Respondents admitted to the removal of the objects which in this case happen to be the vehicles in issue; dispossession stands proven. What then remains is for the Respondent to prove that he or she was legally justified to remove such object from the Applicant's undisturbed possession.

7. The Applicant makes the point that in admitting that they have removed the vehicles from the Applicant's lawful possession, the Respondents contradict themselves regarding the reasons for the removal because in their letter, their legal representatives state that the removal was because the Applicant has no right to possess the vehicles, whilst in their answering affidavit they state that the said removal was subsequent to an agreement between the

Respondents and the Applicant.

8. In the case of *Ivanov vs North West Gambling Board and Others*[1], the court confirmed that the aim of a spoliation order is to prevent self-help, by way of preventing people from taking the law into their own hands. The Applicant points out that in that regard, the cause for possession is irrelevant. The Applicant argues therefore that a defence in an application for

a spoliation order cannot be sustainable in law unless the dispossession is disputed. The author Prize[2]; at page 108, states the following: “the only remedy available to the Respondent is in denial of the facts alleged”.

9. It is trite that in cases of (iudicium possessorium) or possessory suit, the Applicant only has to prove that he or she was in lawful possession and that there was an unlawful deprivation of such possession; that is deprivation without consent. If the Applicant succeeds in proving the above; restoration of the position ante omnia must be ordered. Possession must be ordered to be restored. However, in this case, the Respondents dispute that the alleged dispossession was unlawful. They aver that the Applicant consented to the removal within the process of discussions, arrangements and dealings done with JTТА and that the cited Respondents are also lawful possessors, according to laws governing intestate succession, of the assets of the estate including the 12 (twelve) taxis; inclusive of the four which are subjects of this application, which taxis operated under JTТА.
10. It is trite that this court has a discretion which it can exercise judicially, after considering the facts of the case. The discretion

has to be exercised upon grounds which a reasonable court would apply In order to reach a just conclusion.[3] The Respondents contend that the question arises whether the Applicant and Respondents, as lawful possessors, were not deprived of possession, unlawfully so by JTТА who are not joined in the application. They submit that this question must be answered in the affirmative and that this clusters both the Applicant and Respondents due to the abrupt decision by the JTТА.

11. The Respondents argue therefore that if the adjudication of this matter were to be fair and equitable, JTТА should have been joined in this application given its role in the matter. Notwithstanding the apparent “unlawful” conduct by JTТА, possession should be the incident of use of the said property (See Joyce Ntombela and Another v Baramall (Pty) Ltd, [4] This matter dealt with quasi-possession in respect of the supply of electricity and water. At the time the Applicant claims that she was unlawfully deprived of possession but the Respondent submitted that the dispossession was with the participatory consent in that it acted in concert with the Applicant to secure and keep the estate assets safe. The Applicant in this case submitted that the taxis where no longer being used and could no longer be kept at premises controlled by JTТА.
12. The Respondents point the following out:
 - 12.1. That they have a reasonable apprehension of irreparable and imminent harm to the established right. As submitted, laws governing the administration of deceased estates will ensure just and equitable restoration to the whole body of heirs of the deceased estate of Mr. Mthethwa, including the Applicant should she lodge a claim of loss of support.
 - 12.2. That the balance of convenience does not favour the

Applicant, in that the Respondents are also by default in a similar position with Applicant. They contend further that the alleged deprivation of possession is not unlawful because the Applicant consented and participated in the events leading towards JTTA pulling taxis off the road.

12.3. The Respondents also point out that there are other remedies available at the disposal of the Applicant which are afforded by laws governing the administration of deceased estates.

12.4. The Respondents make the point that in respect of the above elements which have been established more than a century ago, and blended with a modicum of current constitutional order that promotes the objects, spirit and purport of the Constitution. Applicant relies on the following case law:

Setlogelo v Setlogelo.[5]

13. It is trite that in their nature, spoliation applications do not involve suits on the merits (iudicium petitorium). The Applicant will not be restored to possession if she has no vestige of a reasonable or plausible claim. The Respondent on the

other hand, must show conclusive proof of ownership of the article in question”, (see Coetzee v Coetzee.[6] The Respondents argue that because they have proved consent and participation on the part of the Applicant in removing the vehicles,

the claim of unlawful and forcible deprivation of possession of the four taxis subject to the dispute is not plausible or reasonable.

14. The Applicant swears under oath, in paragraph 6, 7 & 8 of the founding affidavit that the late Mr. Mthethwa is her husband. She attached Annexure “LD”, which is intended to be proof of lobola payment. However, the Respondents argue that this is in fact only proof of payment of damages to her family in respect of the minor child so that he can assume the Mthethwa surname.
15. In paragraph 11 of the founding affidavit, the Applicant claims that all vehicles mentioned in subparagraphs 8.1 to 8.4 are under finance with First National Bank. The Respondents charge that the Applicant is clutching on straws given that the vehicles mentioned in paragraphs 8.2 (D[...] 7[...] V[...] G[...] the correct year model of which is 2015, and C[...] 6[...] V[...] G[...] of year model 2013, are paid up.
16. In paragraph 14, the Applicant stated under oath that a tow truck was used when the vehicles were taken. The Respondents charge that this is not true and that the untruthful statement about a tow truck is intended to evoke mercy on the part of the court. The Respondents aver that the Applicant knows that by agreement and consent, her own brother participated in driving the vehicles at the time they are alleged to have been unlawfully removed. The Respondents point out that the above inconsistencies, inaccuracies and distortion of facts as advanced by the Applicant ought to guide and assist this court to conclude that the claim of unlawful and forcible deprivation of possession is unreasonable and implausible; much as it is untrue.

17. The Respondents argue that the Applicant did not disclose to this court that she was present and that she participated in meetings with the JTTA and the Respondents. They charge that the Applicant is avoiding to mention this because she wants to conceal the fact that she consented to the vehicles being taken from her possession which is what the Respondents raised in their defence. They aver that their denials and allegations are not far-fetched or untenable and that it would be unjust if the court rejects them. To substantiate this aversion, they cite the case of {(see Associated South African Bakeries (Pty) Ltd vs Oryx & Verenigde Backerein (Pty) Ltd en Andere.[7] }. The Respondents argue that this application for spoliation order stands to be rejected by this court.

EVALUATION.

18. In this case, the Respondents do not dispute that they removed the vehicles in issue from the peaceful and lawful possession of the Applicant. However, they contend that the removal was consequent to discussions which culminated in agreement with the Applicant. They contend that the said discussions culminated in participation on the part of the Applicant in the removal of the vehicles. They also charged that the Applicant involved her brother who also participated in driving the said vehicles when they were being removed.
19. It is fact that the vehicles were in the lawful and the peaceful possession of the Applicant until they were removed at the instance of the Respondents. It is also fact that the vehicles belonged to one Mthethwa who has since passed on. It is also fact that Mthethwa had a relationship with the Applicant. She contends that she and the deceased Mthethwa were husband and wife and to that end; Mthethwa paid lobola as an act of formalizing their marriage.
20. The Respondents on the other hand, contend that the money paid by Mthethwa comprises what is referred to as 'damages'

and it was paid so as to get a child born of Mthethwa in the Applicant to adopt Mthethwa's surname. The Respondents do not

explain the basis upon which they get to be qualified to classify the money paid by Mthethwa to the Applicant's family. If the vehicles in question get returned to the possession of the Applicant, such a development shall not signal the end of the story around these vehicles.

21. In this application, the Applicant seeks an order that shall ensure a return to the status quo ante. A return to the status quo ante is not supposed to have any bearing on the process of the administration of Mthethwa's deceased estate. As already stated, questions of ownership of the vehicles shall be decided within the process of the administration of Mthethwa's deceased estate. That process is not a responsibility or competency of any of the Respondents.
22. In other words, it is not any of the Respondents who has to determine how the administration of Mthethwa's deceased estate

should evolve. Neither does any of them have the competency to determine what happens to any of the property belonging to Mthethwa's

deceased estate while a decision of the Master of the High Court regarding Mthethwa's deceased estate is awaited. None of the Respondents has the competency to decide whether the Applicant is a widow or a former girlfriend to the deceased; (Mr. Mthethwa).

23. What is before this court has to do with whether the Applicant was in the lawful and peaceful possession of the property in issue.

As already indicated, there is no dispute about that question. It is common cause between the parties that the Applicant was in lawful and peaceful and undisturbed possession of the vehicles in issue. The issue to be determined by this court concerns whether the property was lawfully taken all removed from the possession of the Applicant.

24. If the vehicles were in the lawful and peaceful possession of the Applicant; then there is supposed to be a legal basis on the basis of which they can be taken from the Applicant's lawful possession. The Respondents argue that the consent and active participation of the Applicant constitute a basis upon which the removal of the vehicles from the Applicant's possession is justified. They also contend that they too are co-owners of the said vehicles. However; as already indicated, both parties agree that the question of ownership of the vehicles is not yet up for decision because it is part of the competency of the Master of the High Court who shall deal with it among others within the process of the administration of Mthethwa's deceased estate.

25. Consequently, the court finds that the Applicant was in the lawful, peaceful and undisturbed possession of the vehicles in issue in this case. It finds further that the Respondents removed the said vehicles from the lawful and peaceful possession of the Applicant without any legal basis. Consequently, the application stands to be granted.

COSTS.

26. It is trite that costs follow the cause. Over the proceedings of this case, the court did not find the conduct of any of the Respondents to be vexatious, unscrupulous, dilatory or mendacious. That being the case, the court finds that none of the Respondents conducted themselves over the course of the proceedings here-in in such a way that they ought to attract a cost order to them.

27. In the result, the court finds that the Applicant has satisfied the requirements for the granting of an application for mandament van spolie. Consequently, the following order is made:

ORDER.

Having heard counsel for the Applicant and having read papers filed of record, it is hereby ordered that:

27.1. The matter is dealt with as one of urgency in terms of Rule 6(12) of the Rules of this Court and that the normal high court Rules

relating to applications are dispensed with and insofar as the applicant has not complied with the Rules of this Court; her failure

to do so is condoned.

27.2. The Respondents, Mbali Adelaide Mthethwa and Ntombizodwa Mthethwa are ordered to return the following vehicles into the Applicant, Nosipho Thobekile Xaba`s possession.

27.2.1. Toyota Quantum 2020 model, with registration letters and numbers H[...] 9[...] V[...] G[...].

27.2.2. Toyota Quantum 2020 model with registration letters and numbers D[...] 7[...] V[...] G[...].

27.2.3. Toyota Quantum 2020 model with registration letters and numbers C[...] 6[...] V[...] G[...].

27.2.4. Toyota Quantum 2020 model with registration letters and numbers H[...] 9[...] C[...] G[...].

27.3. The Sheriff Ekurhuleni North is authorised and directed to remove the following vehicles from the Respondents; Mbali Adelaide Mthethwa and Ntombizodwa Mthethwa and to deliver them to the Applicant, Nosipho Thobekile Xaba`s possession.

27.4. All parties to pay their own costs.

T.A. Maumela.

Judge of the High Court of South Africa.

REFERENCES

For the Applicant: Adv. Moshoeshoe Moshoeshoe Instructed by: L E Thobejane Attorneys for the Respondents: Botha Massyn & Thobejane

Judgment

heard: 28 September 2021

Judgment

delivered: 03 November 2021

[1]. 2012 (6SA) 67 (SCA).

[2]. In, The possessory remedy in Roman Dutch Law (1947).

[3]. (See Graham v Odendaal 1972 (2) SA 611 (A) at 616; Naylor and Another v Jansen 2007 (1) SA 16 at 23F – 29D).

[4]. (Case Number 07/13808 in the South Gauteng High Court on 4 July 2007 (Unreported)).

[5]. 1914 AD 221.

[6]. 1982 1 SA 933 (C) 935D).

[7]. 1982 (3) SA 893 (A).

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