

SOUTH AFRICA / JUDGMENT

Zinju v King Sabata Dalindyebo Local Municipality (4742/2023) [2023]

ZAECMHC 67 (8 December 2023)

[2023] ZAECMHC 67

COURT

Eastern Cape High Court, Mthatha

BEFORE

Zono

CASE / FILE NUMBER

4742/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MTHATHA)

Case

No: 4742/2023

In

the matter between:

BONAVENTURE

AJAPZI ZINJU

Applicant

and

KING

SABATA DALINDYEBO LOCAL MUNICIPALITY

Respondent

JUDGMENT

ZONO AJ

[1] The applicant approached this Court on Urgent basis for an Order that is more fully set out in the Notice of Motion appearing at page 26 of the papers. The order that the applicant seeks is of a final nature.

[2] The relief the applicant seeks in his Notice of Motion is framed as follows:

“1. That the applicant’s non-compliance with the rules relating to forms, service and time limits be and is hereby condoned and the applicant be and is hereby granted leave to bring this application as a matter of agency in terms of Rule 6 (12) of the uniform rules of Court;

2. The applicant be and is hereby condoned for the non-compliance with the required 72-hour notice prescribed in terms of Section 35 of the General Law Amendment Act 62 of 1955;
3. That the respondent’s dispossession of both the applicant’s his hair saloon and nail bar business container and the municipal stand/land on which the said container was located at Victoria Street, Mthatha by impounding the said the container and keep it to the respondent’s custody declared unlawful and is set aside; (sic)
4. That the respondent be and hereby directed to refrain from unlawfully dispossession the applicant of his white hair saloon and nail bar business container and the municipal land/stand on which the said container was located, by returning the said container and on the municipal stand/land on which it was located at Victoria Street, Mthatha, forthwith; (sic)
5. That the respondent be and hereby directed to pay costs of this application on a scale is between attorney and client; and
6. Granting such further and/or alternative relief favourable to the applicant.”

[3] The gist of the applicant’s complaints can best be summarized as follows:

[4] He was carrying on business at Victoria Street, Mthatha in what he calls White Chris Hair Saloon Container. He contends that on 14 September 2023 his business was served with a Notice by the respondent. Th said notice, although it is illegible, appear to have been addressed to one Mr Romeo.

[5] The Notice referred to above contained the following faint words:

“Having Erected a Structure Without Approval by the Local Authority... as of 14 September 2023 of the date hereof required to remove the structure within 24 hrs.”

[6] He further contends that on 15 September 2023 the respondent’s Law Enforcement Officers arrived and impounded his business container from Victoria Street, and took it to their possession without his consent or permission, or without a Court Order. He contends that they were not authorized by any law to do that. On the same day he rushed to the

respondent's offices with notice aforestated. He was told to come in two weeks at which time the person dealing with the removal and impounding of containers would be back. That is surprising because the removal of the business container was on the same day.

- [7] On the 29 September 2023 he went again to the respondent's offices at Munitata Building, Sutherland Street, Mthatha, but was sent to respondent's offices situated at Elliot Street, Mthatha, as the officials there would be able to advise of what was required of him. As it was on Friday on that day, he approached respondent's offices at Elliot Street on 02 October 2023 and on his arrival an admission of guilt and towing fees were demanded and he refused to pay. He left their offices.
- [8] On 19 October 2023, he voluntarily went again to the respondent's offices with expectation that someone would be able to help him. It is not clear what the basis of that expectation was as their demand to pay was refused. The basis of the refusal was that his business container was illegally dispossessed. He sought to speak to a person who would hear him. The same demand that he must pay the admission of guilt fine and towing fees prevailed. It appears that the applicant went to the respondent's offices on 30 October 2023 where he was pushed from pillar to post.
- [9] On 01 November 2023 he approached his legal representatives for consultation or instruction. Pursuant to those instructions a letter of demand was served upon the Municipality on 02 November 2023 which was followed by another letter on 06 November 2023. On the 10 November 2023 the respondent demanded written proof of ownership in response to applicant's demand. That demand prompted a search by the applicant of the seller called Romeo Foupou from whom the container was bought, but to no avail. Another fruitless letter was penned on 16 November 2023.
- [10] These proceedings were only launched on 20 November 2023 on urgent basis.
- [11] This application attracted opposition in terms of which notice to oppose and answering affidavit were filed. However, there is something curious in the Answering Affidavit. It is deposed to by one Fundisile Guleni, who describes himself as "A male with address for the purposes of these proceedings at No. 2[...] C[...] V[...] Street, and M[...] Street, first floor Steve Motors Building, Mthatha, Eastern Cape Province." Nothing at all connects him to the Municipality, and to the event that took place on 15 November 2023. His evidence is of hearsay nature. The probative value of his evidence depends on the people.
- [12] Whilst I do not know where the deponent in the respondent's affidavit is coming from, who authorized him to depose to affidavit, and the relationship he has with the respondent, I propose not to consider same and just deal with the applicant's matter as an Unopposed matter.
- [13] Applicant's application is predicated on the principles of mandament van spolie which displays the following characteristics:

- (a) It is a possessory remedy;
- (b) It is an extra ordinary and robust remedy;
- (c) It is a speedy remedy

See: Blendrite (Pty) Ltd v Moonisani 2021 (5) SA SCA para 6.

It arises from these characteristics that it is a possessory and speedy remedy. Speediness is the nature thereof. I am therefor disposed to deal with this matter speedily in the light of its characteristics.

13.1 I am mindful of what was said in Trans-Africa Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 177A-B where it was held:

“Parties and legal practitioners should not be encouraged to become slack in the observance of the Rules, but technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with expeditious and, if possible, inexpensive decision of cases on their merits”

Rules should be interpreted and applied in the spirit which will facilitate the work of the Courts and enable litigants to resolve their disputes in a speedily and in- expensive manner as possible. See: Ncoweni v Bezuidenhout 1927 CPD 130. Rules exist for the Court and not the Court for the Rules. See: Eke v Parsons 2016 (3) SA 37. Accordingly the point of lack of urgency raised during argument of this case cannot be upheld.

[14] In order to obtain a spoliation order two allegations must be made and proved:

- (a) that the applicant was in possession of the property;
- (b) that the respondent deprived him of the possession forcefully or wrongfully against his consent.

See: Yeko v Qana 1973 (4) SA 735 (A) at 739; Ivanov v North West Gambling Board 2012 (6) 67 SCA at 75C.

[15] In spoliation proceedings the court is not concerned with the lawfulness of the applicant’s possession. In other words, the applicant must not show that he was entitled to be in possession, but that he was in de facto possession at the time of being despoiled. In Mbuku v Mdinwa 1982 (1) SA 219 (Tk) at 220 it is stressed that an applicant for a spoliation order must establish the fact of his possession, for it is that which he is seeking to recover.

[16] The possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with intention of securing some benefit for himself, accompanied by the physical element of corpus or detentio. See: Reek v Mills 1990 (1) SA 751 (A) at 759D.

[17] The applicant makes the following pertinent allegations in his founding affidavit:

“11.1 I was in possession of my white Chris Hair Salon nail bar business container and the Municipal land/stand on which it was located with the intention of some benefit from them for myself and my family.

11.1 The respondent has deprived me possession of my business container and the Municipal land/stand, on which my container was located by resorting to self-help that is, without the order of the Court, without my consent and without rightfully, lawfully and/or adequately exercising the powers vested to it by some statute(s) to dispossess me.

11.2 I was in peaceful and undisturbed possession of the said container and the said land.

11.3 That respondent's conduct is wrongful and unlawful and should be set aside.

[18] During oral submissions the following facts were not disputed:

18.1 That the business container was dispossessed by the respondent and it is now in respondent's custody.

18.2 It was further argued on behalf of the respondent that the business container would be released to the applicant upon proof of ownership. It was not disputed that the applicant visited respondent's offices and premises to demand his business container but was required to show proof of ownership. This was argued in the context of disputing applicant's locus standi to say the applicant is not the owner of the business container, but a certain Romeo is.

[19] What is not disputed is what is contained in applicant's wife affidavit, that, on 14 November 2023 she was the person in her husband's business when the business was served with the notice to remove the business container. She is the one who received the notice as her husband, the applicant was in Durban. She further states as follows:

“8. On Friday the 15 September 2023, during the day, whilst my husband had just arrived from Durban seeking advise from other street traders, Law Enforcement Officers of the respondent arrived and impounded our Chris Hair Salon and Nail Bar business container and took it to their possession or keeping without hearing or accepting any word from us. I attach hereto a photograph I took in the process of impounding as BAZ-7.”

BAZ-7 is a copy of what appears to be container.

[20] In paragraph 9 she states as follows:

“9. Neither my husband nor myself, have given permission or consent for my husband's Hair Salon and Nail Bar business container to be impounded and to the possession of the respondent or KSD Local Municipality.”

[21] During oral argument, the respondent's Counsel was at pains to submit that the dispossession was lawful. He could not assist the Court with the legal provisions that were used to dispossess applicant's business container. He only contented himself on two submissions, which are the following:

21.1 That the applicant was not the owner of the business container, hence he could not produce proof of ownership to the respondent's officials on demand.

21.2 Secondly, he relied on the Notice that was issued and received by applicant's wife on 14 November 2023, which notice was advising the addressee whom they thought is the owner, to remove the container within 24 hours. Nothing that notice said beyond that.

[22] I am accordingly persuaded that the applicant and his wife were in possession of the business container and that container was unlawfully removed or dispossessed from them by the respondents on 15 November 2023.

[23] What is remaining now is the issue of restoration of possession. It seems to be common cause that the container was unlawfully placed at the place from which it was taken. To direct the respondent to return the business container to the place from which it was taken would be in my view a certificate of an unlawful conduct. The business container was unlawfully placed on the place it was.

[24] Accordingly, the Court has a duty to uphold the doctrine of legality by refusing to countenance on ongoing illegality. See: *Lester v Ndlame Municipality And Another*, 2015 (6) SA SCA para 27-28. I have a duty not to direct the business container to be returned to the place from which it was taken as that would be an order to commit crime or to continue with statutory contravention. Equally I cannot allow the respondent to continue to unlawfully possess the business container.

[25] I accordingly intend to grant an order in terms of which the business container is returned to the applicant at his residential place or at any agreed place where it may lawfully be possessed. For that reason, the applicant is substantially successful in this matter and therefore costs should follow the result.

[26] In the result the following order shall issue:

26.1 The respondent is hereby directed to forthwith return the business container unlawfully dispossessed by the respondent on 15 September 2023 to the applicant at his address situated at No. 3[...] S[...] Street, Hillcrest, Mthatha, Eastern Cape or at an agreed place where it may lawfully be possessed.

26.2 That the respondent shall pay costs of this application.

A.S. ZONO

ACTING JUDGE OF THE HIGH COURT

Appearing for the applicant: Adv. Nonkelela Instructed by: Titi W. Attorneys MTHATHA.

Appearing for the respondents: Adv. Genukile Instructed by: T.L. Luzipho MTHATHA. Heard on: 05 December 2023 Delivered on: 08 December 2023

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