IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MTHATHA

Case No: 1627/2021

In the matter between

SIMBONILE SHADRACK XOXO	Applicant
And	
MINISTER OF POLICE	1st Respondent
OLD MUTUAL INSURE LIMITED	2nd Respondent

JUDGMENT

PAKATI J

INTRODUCTION

[l] The applicant applies for mandament van spolie against the Minister of Police ("the Minister") and Old Mutual Insure Limited ("OMIL"), the first and second respondents, for the return of his motor vehicle, a Volkswagen VW 24 X-Polo, with registration number JHB 087 EC. He also seeks an order declaring invalid and setting aside the unilateral confiscation of his motor vehicle by the members of the first respondent without a search warrant. The respondents oppose the application.

THE PARTIES

[2] The applicant is a Social Worker who currently resides at Cofimvaba in the Eastern Cape. The Minister is cited on the basis that he is statutorily liable for the conduct of its

members in the South African Police Services ("the SAPS"). OMIL, Registration Number 1970/006619/06, was joined in these proceedings on 21 September 2020 as having a direct and substantial interest in the relief sought because the motor vehicle in question is in its possession.

[3] Before dealing with this case, let me dispose of an application for condonation brought by the first respondent for the late filing of his heads of argument. Mr Maliwa, for the first respondent, submitted that the first respondent would be highly prejudiced if he was not allowed to present his case. He submitted further that the applicant would suffer no prejudice if the matter proceeded to finality. Mr Mdunyelwa, for the applicant, did not oppose the application but submitted that the case of the first respondent would only be argued on the applicant's founding affidavit. Mr Van der Linde for the second respondent did not oppose the application. In response to the applicant's submission, Mr Maliwa confirmed that the application would be argued on the applicant's founding papers. In my view and the interest ofjustice, the parties stand to benefit from the judgment of this court on the merits. Without saying what informs my decision on this application, it suffices to say that I condoned the first respondent's late filing of its heads of argument.

THE APPLICANT'S CASE

[4] The applicant alleged that he bought the motor vehicle for R80 000.00 from a private treaty in 2020. He alleged further that he lawfully registered it in his name. In March 2020, members of the SAPS approached him and requested permission to search his motor vehicle, which he allowed. They informed him that they had been looking for it where after they demanded its keys from him and confiscated it. A day after the seizure of the motor vehicle, the applicant visited the office of the Vehicle Identification Section Unit ("the VIS Unit") where he met the investigating officer who asked him to provide proof that he was the owner, which he did, by producing the 2019 and 2020 licence discs.

[5] The applicant contended that the motor vehicle confiscated from him by the police officials had a different VIN from that of the stolen one they sought. For this assertion,

he attached to his founding affidavit, a letter from the SAPS dated 29 March 2021, 2018 and 2019 licence discs as annexures "SSXI "SSX2" and "XXS3" respectively wherein the VIN referred to is AAVZZZN2AU002354. The Vin Number of the one seized from him was AAAVZZZ9NZ9U008921. The letter referred to was written by SM Mgulwa, the VIS Unit Commander, Queenstown, addressed to Keightley Sigadla Incorporated in East London, which records:

> "RE: SIMBONGILE SHADRCK XOXO
>
> Your ref no. SIGADLA/EL/EP0072 refers
>
> In respect of the above this office wish to report the following:
>
> The vehicle was examined by VCIU and VSS members Queenstown and certain numbers were sent to Volkswagen SA PTY Ltd for further examination by a factory expert.
>
> The factory expert examined the vehicle by means of the Kenn number 094224555 the VW history system and verified that it was issued to a Silver Polo with VIN number AAVZZZ9N2AU002354. The mentioned Chassis number belonged to a stolen VW Polo, which was reported stolen at Florida in March 2014. The vehicle was then handed over to the
> Old Mutual Insurance 2020-05-11."

[6] The applicant accepted that the police officers suspected that the motor vehicle was stolen but contended that they ought to have obtained a search warrant in order to conduct a lawful search and seizure. He argued that the police officers applied a selfhelp approach. He argued further that its deprivation was wrongful as it took place without due process of the law. For this assertion, Mr Mdunyelwa, for the applicant, relied on George Municipality v Vena and another 1989 (2) SA 263 (A) at 2711-1-272B wherein Milne J referred to Sithole v Native Resettlement Board 1959 (4) SA 115 (W) at 117D-F. In that case, the court as per Williamson J remarked:

> "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, wduld 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."

[7] Mr Mdunyelwa submitted that mandament van spolie is available against the police where they seize goods unlawfully. He submitted further that sections 68(6) (b) and 89(1) of the National Road Traffic Act 93 of 1996 ("the NRA") do not preclude

restoration of the applicant's motor vehicle. That is so because possession of a tampered motor vehicle is unlawful only if it is without lawful cause to possess it. He asserted that there should have been an enquiry before the applicant was dispossessed of the motor vehicle. S 68(6) (b) provides:

> "No person shall —
>
> (b) without lawful cause be in possession of a motor vehicle of which the engine or chassis number has been falsified, replaced, altered, defaced, mutilated, or to which anything has been added, or from which anything has been removed, or has been tampered with in any other law."

[8] S 89(1) states:

> "Any person who contravenes or fails to comply with any provision of this Act or with any direction, condition, demand, determination, requirement, term or request thereunder, shall be guilty of an offence."

[9] In Sithole supra, the court held that the Native Resettlement Board was not entitled, by virtue of s 1 7 of the Native Resettlement Act 19 of 1954, to enter upon, take possession of the property, and demolish it whenever it pleased. That is so especially, where possession had not been surrendered to it upon expiry of the time provided for in section 17(6), without any further action. The Board may only take possession if not given by instituting a legal process to get permission.

[10] The applicant acknowledged that the police officers handed the motor vehicle over to OMIL as can be gleaned from paragraph 3 of a letter addressed to VIS Unit by the applicant's attorneys dated 15 March 2021. that vehicle could not be retrieved due to it being supposedly given to an insurance company.' The papers show that when the application was issued on 15 April 2021 the applicant knew that the motor vehicle was no longer with the first respondent but second respondent. The VIS Unit, as per Cpt Mgulwa, confirmed that the motor vehicle was handed over to OMIL on 1 1 May 2020.

A letter forwarded by the applicant's attorney, Keightley Sigadla Incorporated, to VIS Unit dated 15 March 2021 reads:

> "We hold instructions and act on behalf of Simbongile Shadrack Xoxo, who shall herein be referred to as "our client.'

Our instructions are as follows:

1.

On or about March 2020, our client's vehicle (Volkswagen VW 24X-Polo, Licence number: JHB 087 EC) was confiscated by police officers and subsequently taken to VIS Unit in Queenstown. This occurred after our client was asked by the police officers if they could search his vehicle, ensuing that, informed him that his vehicle was a stolen vehicle that they had been looking for. 2...

3. Our client took it upon himself to go to the VIS Unit and enquire about the car in question, but he was perturbed when met with the news that the vehicle could not be retrieved due to it being supposedly given to an insurance company.'

THE FIRST RESPONDENT'S DEFENCE

[11] Sergeant Nzuzo Tyulu, the deponent to the first respondent's answering affidavit, is a trained vehicle Identifying Investigator whose duty entails clearance and identification of stolen vehicles, changed, cloned and tempered vehicles. He stated that on 20 March 2020 W/O Fabio Pitt, attached to the K9 Unit, approached him requesting assistance regarding the further investigation of a motor vehicle, which he had confiscated. He opened an enquiry docket in order to continue with the investigations, which revealed that the chassis and engine numbers were tampered with. In order to verify the original engine numbers, the factory assisted him by using Ken number 094224555, which ultimately confirmed that the motor vehicle was initially issued with a chassis number AAVZZZ9NZAU002354. For this assertion, he relied on the findings of Mr Ivan Dicker, a representative of Volkswagen Group South Africa in his capacity as Vehicle Manufacturing Representative, which record thus:

> "After receiving the enquiry I checked the Ken number on the VW history system and verified that it was issued to a silver VW Polo with a VIN number AAVZZZ9NZAU002354. The vehicle was manufactured on 29/10/2009 at the Uitenhage plant."

[12] Sgt Tyulu further established that the motor vehicle was insured by OMIL, which claimed to be the owner of the motor vehicle. The motor vehicle was then handed over to a Mr Donn-Riaan Young of OMIL. Sgt Tyulu stated that he informed the applicant that the motor vehicle was reported stolen at Florida, Johannesburg with CAS Number 743/03/2014. He further informed him that it could not be released to him but to the claimant, OMIL.

[13] The first respondent further relied on sections 20 and 22 of the Criminal Procedure Act 51 of 1977 ("the CPA"). The principle ofour law is that persons are not entitled to take the law into their own hands to enforce their rights. Sections 20 and 22 provide:

> "20 State may seize certain articles
>
> The State may, in accordance with the provisions ofthis Chapter, seize anything (in this Chapter referred to as an article)-
>
> (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere.
>
> 22 Circumstances in which article may be seized without search warrant
>
> A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 —
>
> (a) if the person concerned consents to such search for and the seizure ofthe article in question, or ifthe person who may consent to the search ofthe container or premises consents to such search and the seizure of the article in question.'
> (b) If he on reasonable grounds believes — (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; (ii) that the delay in obtaining such warrant would defeat the object of the search."

THE SECOND RESPONDENT'S DEFENCE

[14] OMIL contended that it did not deprive the applicant of possession of the motor vehicle and that it is justified to have it in its possession as it indemnified the insured for the total loss.

ISSUES

[15] It is common cause that the police officers did not have a search warrant or a court order when they searched and seized the motor vehicle, as alluded. It is further common cause that OMIL did not deprive the applicant of the right to possess the motor vehicle. It is undisputed that the applicant was in peaceful and undisturbed possession when he was dispossessed of the motor vehicle. In dispute is whether the applicant was deprived of possession unlawfully, and therefore entitled to the relief of spoliation that he seeks. The issue further is whether the search and seizure of the motor vehicle without a warrant were unlawful in the circumstances.

SPOLIATION

[16] It is trite that spoliation is the wrongful deprivation of another's right of possession. An applicant seeking mandament van spolie must prove two requirements namely, an allegation that he was in peaceful and undisturbed possession of the thing and was unlawfully deprived of such possession. [1] In this context 'unlawful' refers to dispossession without the plaintiffs consent or due legal process.[2] A duty rests on the applicant to convince the court that the dispossession took place unlawfully. It is a fundamental principle ofour law that no one should take the law into his/her own hands and the statute should be so interpreted that it interferes as little as possible with this principle. It is available even against government entities and it matters not that it may purport to act under the colour of law, statutory or otherwise. The relevant question is whether it is properly acting within the law. This also applies to police officers who dispossess an individual of an object unlawfully thereby purporting to act under the colour of search and seizure provided for in sections 20 and 22 of the CPA. This means that non-compliance with these sections in seizing a person's thing is unlawful. The unlawfulness as well as other requirements for spoliation order satisfy the requisites for the order. Moreover, it would be at odds with the constitution if the reading of s 68(6) (b) and 89(1) in a manner that ousts mandament and may lead to a culture of impunity amongst the police. Importantly, spoliation is a robust remedy. It is also a possessory remedy, the unlimited and exclusive function of which is to restore the status quo ante, and it, therefore, matters not that the spoliator might have a stronger claim to possession

[1] George Municipality V vena and another [1989] (2) All SA 125 (A), 1989 (2) SA 263 (A) at 271 D. see also

Ngqukumba v Minister of Safety and Security and Others [2014] (2) SACR 325 (CC); 2014 (5) SA 112 (CC) para [10] where a unanimous court remarked that the essence of a mandament van spolie was restoration before all else of unlawfully deprived possession to the possessor.

[2] ATM Solutions (Pty) Ltdv Oikru Handelaars CC [2009] 2 All SA 1 (SCA), 2009 (4) SA 337 (SCA).

than the person spoliated or that the latter has indeed no right to possession? The purpose of a mandament van spolie is a speedy restoration of possession to the person who has been unlawfully deprived of possession.

ANALYSIS

[17] The applicant states that his vehicle was dispossessed in March 2020 but surprisingly, he does not mention the specific date. It is clear from the papers that he took the first step in this regard on 15 March 2021, more than a year after it was seized when his attorney of record forwarded a letter to the first respondent requesting the return of the vehicle. In response, the first respondent sent a letter dated 29 March 2021 to the applicant's attorney advising that the motor vehicle was handed over to OMIL which meant that he was also aware then that the motor vehicle was no longer in the possession of the first respondent. Therefore, the argument that the first respondent was in haste in taking the motor vehicle to OMIL cannot stand because the applicant's motor vehicle was seized in March 2020 and he did nothing about it until 15 March 2021.

[18] Although it is common cause that the motor vehicle was taken from the applicant by police officers without a search warrant, the applicant, in his replying affidavit, contends that he allowed the search "driven by fear of being arrested and such submission cannot now be construed by the members of the Respondent as being consent and voluntary." In my view, this contradicts what appears in paragraphs 9 and 10 of the founding affidavit, which read thus:

> "9. On March 2020, the members of the Respondent approached the Applicant as Police officers and showed their appointment letters. They asked for a permission to search the vehicle of the Applicant for which the Applicant allowed.
>
> 10. During or after the search, the members ofthe Respondent then informed the Applicant that, this is the vehicle that they have been looking for and told the Applicant that they are taking it with them. The Applicant, as was instructed, handed the keys and members of the Respondent drove off."

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[3] See Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989 (l) SA 508 (A) at 512,4-B.

[19] The reading of these paragraphs shows that the applicant consented to the search and seizure ofthe motor vehicle. Nowhere in the founding affidavit does he state that 'such permission was driven byfear ofbeing arrested. ." It came out for the first time in the replying affidavit when raised by the first respondent in the answering affidavit. It,

therefore, cannot be said that the motor vehicle was seized unlawfully otherwise if it was the case of its engine or chassis number was tampered with and unlawfully seized, the police would have to return it either voluntarily or after the mandament van spolie has been successfully granted. That is so because self-help is so repugnant to or constitutional values that where it has been resorted to in despoiling someone, it must be purged before any enquiry into the lawfulness of the possession of the person despoiled. It should be remembered that restoration of possession might be to a person who might be shown to be a thief.

[20] Regarding spoliation, Nugent J in Rikhotso v NorthcliffCeramics (Pty) Ltd and Others 1997 (1) SA 526 (W) at 532G-1 remarked:

> "The remedy afforded by the mandament van spolie, expressed in the maxim spoliatus ante Omnia restituendus est, is generally granted where one party to a dispute concerning possession of property seizes the property pursuant to what he believes to be his own entitlement thereto. In such cases, a Court will summarily order return of the property irrespective of either party's entitlement to possession, and will not entertain argument relating to their respective rights until this has been done. The principle underlying the remedy is that the entitlement to possession must be resolved by the Courts, and not by a resort to self-help. By its nature then a spoliation order will usually operate as no more than a preliminary order for restoration of the status quo until the entitlement to possession ofthe property is determined. The assumption underlying the order is that the property exists and may be awarded in due course to the party who establishes an entitlement thereto."

[21] In casu, section 22 of the CPA makes search and seizure without a warrant lawful where the person who may consent to the search consents to such search and seizure, as in the instant case. In terms of the Constitution, a person's right to privacy is subject to reasonable and justifiable limitation in terms of s 36. In casu, the present case the applicant accepts that the police officers suspected that the motor vehicle was stolen hence, he consented to the search and seizure and produced certain documents,' as alluded. He contended that they ought to have obtained a search warrant in order to conduct a search and lawfully retrieve the motor vehicle, as alluded. He did not allege that the officials were in a fishing expedition in violation of his constitutional right to privacy. It is also not his case that they had no reasonable grounds when they acted without a warrant.

JOINDER OF THE SECOND RESPONDENT

[22] The applicant learned that the motor vehicle had been handed over to OMIL on I I May 2020, via a letter dated 29 March 2021, as alluded. He joined the second respondent only on 21 September 2021, approximately a year and a half after launching the application and proffered no explanation why he delayed the said joinder. Mr Mdunyelwa submitted that the second respondent was joined only because they are in possession of the motor vehicle. He conceded that the second respondent was not involved in its alleged unlawful deprivation. He argued that the haste of transferring the motor vehicle to the second respondent was mala fide, as they wanted to plead impossibility of restoration. This was disputed by the first respondent who explained that there was no explanation by the applicant as to why it delayed the launch of.the application for a year and a half.

[23] It is important to note that the following allegations are absent from the founding affidavit:

23.1 That OMIL was aware of the alleged unlawful deprivation of possession of the motor vehicle by the first respondent or cooperated with the latter in the alleged unlawful conduct; and

23.2 That the handing over of the motor vehicle to OMIL amounted to spoliation or was malafide.

[24] It is trite that the applicant must set out the cause of action in the founding affidavit.[1]Miller J said in Shakot Investments (Pty) Ltd v Town Council ofthe Borough ofStanger 1976 (2) SA 701 (D) at 704F-G thus:

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1 National Council of Societies for the Prevention of Cruelty to Animals v Openshaw (WCC) 2008 (5) SA 339 (SCA) at 34974-13 where Cameron JA held: "[29] It is trite law that the applicant in motion proceedings must make out a proper case in the founding papers. Milner J in Shakot Investments (Pty) Ltd v Town Council ofthe Borough of Stanger, relief 1976 ought (2) in SA his701 founding (D) at affidavit 704F-G to puts disclose the matter suchfacts thus: as 'In would, proceedings if true, justify by way the of relief motion sought '''the partyand seeking which would, at the same time, sufficiently inform the other party of the case he was required to meet.

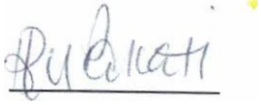
"In proceedings by way of motion the party seeking relief ought to in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet."

[25] It is unclear on what grounds the applicant joined the second respondent in these proceedings, as there is no nexus between the two in the founding affidavit. In its answering affidavit, the second respondent explained that after the motor vehicle was stolen in March 2014 the insured lodged a claim and the former indemnified the insured for the total loss. In this regard, I am satisfied that the applicant has failed to make out a case against the second respondent for the relief sought.

[26] Taking into consideration that the applicant consented to the search and seizure of the motor vehicle by the police officials, he cannot now turn around and demand' its restoration. In my view, he has not managed to satisfy the second requirement of mandamus that the first respondent unlawfully dispossessed him of the motor vehicle. The applicant has also failed to convince me that he is entitled to the declaratory order sought against the respondents.

In the circumstances, I make the following order:

The applicant's application is dismissed with costs.



BM PAKATI

JUDGE OF THE HIGH COURT, EASTERN CAPE LOCAL DIVISION, GQEBERA.

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INSTRUCTED BY: LEXICON A TTORNEYS

DATE HEARD: 24 MARCH 2022

DATE DELIVERED: 21 JUNE 2022