



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MTHATHA]**

CASE NO: 2792/23

Reportable	Yes / No
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In the matter between:

SIMPHIWE KWATSHA

APPLICANT

and

MINISTER OF POLICE

RESPONDENT

JUDGMENT

PAKATI J

Introduction

[1] This is an application brought on an urgent basis for *mandament van spolie* by the applicant against the respondent for the return of 70 goats (“the goats”) to his possession. The applicant also seeks an order declaring the seizure of the goats

unlawful and that the respondent be directed to restore the applicant's peaceful and undisturbed possession of same within 72 hours of the order. The respondent, as the executive head of the Department of the South African Police Services, is cited on the basis that he is statutorily liable for the conduct of his members.

Point in limine

[2] Mr Mnqandi, on behalf of the respondent, raised a point *in limine* of non-joinder of the station commissioner for the first time in his heads of argument. He submitted that the station commissioner is the one in control of the goats and should the court find on behalf of the applicant, the station commissioner would be the one ordered to return the goats. He submitted further that without the joinder of the station commissioner, the application should fail.

[3] Mr Mzileni, for the applicant, opposed the application for the non-joinder of the station commissioner and correctly pointed out that this issue was not raised in the answering affidavit but in the respondent's heads of argument. He argued that failure to cite the station commissioner is unnecessary in the circumstances of this case.

[4] S 2(1) of the State Liability Act 20 of 1957 provides that in any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as a nominal defendant or respondent. The respondent in this case is the nominal respondent and not the station commissioner. Brand JA (Cloete, Snyders, Mhlantla et Petse JJA concurring) in *The*

*Judicial Service Commission v The Cape Bar Council (Centre for Constitutional Rights as amicus curiae)*¹, had this to say:

“[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties* CC 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one. (see eg *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) para 7; Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited.)”

[5] In the instant case, it is unnecessary to join the station commissioner because this issue is raised as a matter of convenience and not necessity. Therefore, the application for non-joinder of the station commissioner cannot stand.

Urgency alleged by the applicant

[6] The applicant alleges that the application is urgent. He contends that he is unemployed and earns a living by selling goats. The respondent disputes that the application is urgent and alleges that urgency is self-created. That is because the applicant was never in possession of the goats.

¹ 2013 (1) SA 170 (SCA)

[7] It is common cause that the goats were confiscated on 30 May 2023. On 31 May 2023, the applicant proceeded to the police station and enquired about the whereabouts of the goats. He was referred to the stock pound where he was told to go to the Stock Theft Unit. At the Stock Theft Unit, the police officers ignored him thereby refusing to assist him and instead referred to him as a thief and liar. He then approached his legal representative, ZP Maketa Attorneys Incorporated, who addressed a letter (Annexure "A") to the Station Commander dated 05 June 2023, claiming the release of the goats within seven days of receipt of the said letter. In that letter, the Station Commander was also warned to release the goats as requested otherwise "*legal action will be taken against you, and we shall seek for costs order against you on a punitive scale.*" On 07 June 2023, the Sheriff, Ms S Mduzulwana, served the letter on the Station Commander at Sulenkama Police Station by handing it over to W/O Mlulami Totyi. When no response was forthcoming from the Station Commander, the applicant's attorney of record advised him to approach court on urgent basis, but he did not have funds to do so. After about a month he managed to raise some funds and on 04 July 2023, he filed a notice on motion thereby giving the respondent two weeks to either respond or return the goats. On 18 July 2023, the respondent filed a notice of intention to oppose the application and an answering affidavit. The applicant filed a replying affidavit on 20 July 2023. The matter was heard the same day.

[8] In *Mangala v Mangala*² Munnik J remarked as follows regarding spoliation as a remedy:

² 1967 (2) SA 415 ECD at 416 para F

“It is true that a spoliation order is a remedy which in the nature of things should be a speedy one, but the fact that there has to be restitution before all else simply means that, once an applicant has proved that he was in peaceful possession and his possession was disturbed, the respondent must restore that position before entering into the merits of the ownership or otherwise of the subject matter. It does not follow that, because an application is one for a spoliation order, the matter automatically becomes one of urgency. The applicant must either comply with the Rules in the normal way or make out a case for urgency in accordance with the provision of Rule 6 (12) (b).”

[9] Rule 6(12) (b) of the Uniform Rules of Court provides that in every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which are averred render the matter urgent and the reasons why the applicant claims that the applicant could not be afforded substantial redress at the hearing in due course.

[10] The applicant stated that he sells the goats to earn a living and presently, he is unable to support his family. He would therefore not be afforded substantial redress at a hearing in due course as he maintains a business of the sale of goats to maintain his family. I am therefore satisfied that the applicant has complied with the provisions of Rule 6(12) (b).

The factual background

[11] The applicant asserted that he is an unemployed male person residing at Rayport Location, Etwa Administrative Area in Qumbu, Eastern Cape, and the owner of the goats. He alleged that he keeps them at Ms Conny Nkalitshana’s homestead

which he also refers to as his homestead. He alleged further that on 30 May 2023 at about 09h00, he was in peaceful, free, and undisturbed possession of the goats.

[12] On the day of the incident three police officers wearing civilian clothes approached his home and were travelling in two unmarked vehicles. On their arrival, they introduced themselves as police officers from Sulenkama Police Station, Qumbu. They enquired as to who the goats belonged, and he responded that they belonged to him. He added that he produced a stock card reflecting the exact number of the goats. Despite that, they confiscated 70 goats from the stock kraal leaving only two thereby wrongfully depriving him of their possession. They did not tell him why they seized the goats.

The answering affidavit

[13] The deponent to the answering affidavit, Mr Odwa Xego, is a constable attached to the Stock Theft Unit in Qumbu. He stated that they (police officers) received information that there were goats kept at a certain homestead at Rayport Location, Etwa Administrative Area, in Qumbu. He, constable Banayi and another unnamed officer proceeded to Rayport Location where *'we found a number of goats in the kraal'*. On their arrival, they observed a male person, who turned out to be Mzwamajola, running away when he saw the police coming. The police officers asked him to stop, which he did and approached the police officers. According to the police officers, he introduced himself as Mzwamajola Nkalitshana and claimed to be the owner of the goats. However, he could not produce a stock card. When requested to depose to an affidavit, he refused. According to the police officers, such refusal raised a suspicion that the goats were stolen, hence they confiscated them.

[14] In the replying affidavit, the applicant denied that the police officers spoke to his uncle, Mzwamajola, when they visited his homestead. He disputed further that Mzwamajola claimed to be the owner of the goats. He was also not asked to produce a stock card and did not refuse to depose to an affidavit. Although the police officers alleged that they suspected that the goats might have been stolen, they neither investigated nor arrested the applicant or his uncle. The applicant denied that there were people who claimed to be the owners of the goats, as alleged by the police officers.

The defences raised by the respondent.

[15] The respondent raised two defences. The police officers denied that the applicant was in possession of the goats at the time of the alleged spoliation. That is because the goats were found in Ms Conny Nkalitshana's homestead who is a mayor in Mpumalanga. They suspected that the goats were stolen as they were not given a satisfactory explanation as to their ownership. They contended that the deprivation of the said goats was not wrongful.

Issues

[16] The issue is whether the applicant was in possession of the goats at the relevant time and whether the respondent dispossessed him of such possession forcibly or unlawfully and against his consent.

The applicable law regarding mandament van spolie

[17] Spoliation is an extraordinary, robust and speedy remedy. An applicant seeking

mandament van spolie must allege and prove that he was in peaceful and undisturbed

possession of the thing and was unlawfully deprived of possession by the respondent.

In this context '*unlawful*' refers to dispossession without the applicant's consent or due

legal process.³ Notably, it is a physical possession, not the right to possession that is protected. Possession for purposes of the *mandament* is not possession in the strict judicial sense. It suffices if the holding was with the intention of securing some benefit

for the plaintiff. The *causa* of the plaintiff's possession is irrelevant, and it is also

irrelevant that the defendant has a stronger right or claim to possession.⁴ Again,

the fact that the claimant's possession is wrongful, or illegal, is irrelevant.⁵ The claim

to relief under the *mandament van spolie* arises solely from deprivation of possession

³ *George Municipality v Vena and Another* 1989 (2) SA 263 (A) at 271D. see also *Impala Water Users Association v Lourens NO* [2004] 2 All SA 476 (SCA), 2008 (2) SA 495 (SCA).

⁴ *Yeko v Qana* 1973 (4) SA 735 (A).

⁵ *Ivanov v North West Gambling Board and Others* [2012] 4 All SA (1) (SCA), 2012 (6) SA 67 (SCA), 2012 (2) SACR 408 (SCA).

otherwise than through legal process.

[18] In *Nino Bonino v De Lange*⁶ Innes CJ held:

“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 wrongly and against his consent of the possession of the 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.”

[19] In *Ngqukumba v Minister of Safety and Security and Others*,⁷ Madlanga J

remarked as follows about the essence of spoliation:

“[10] The essence of *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.”

[20] It is also a possessory remedy, the unlimited and exclusive function of which is to restore the *status quo ante*, and therefore, it matters not that the spoliator might have a stronger claim to possession than the person spoliated or that the latter has indeed no right to possession.⁸ The purpose of a *mandament van spolie* is a speedy restoration of possession to the person who has been unlawfully deprived of possession.

⁶ 1906 TS 120.

⁷ [2014] ZACC 14 Case No. CCT 87/13 at para [10].

⁸ See *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) at 512A-B.

[21] *Mandament* provides for interim relief pending a final determination of the parties rights, and only to that extent is it final. In *Bon Quelle (Pty) Ltd v Otavi Municipality*⁹ the court held that a spoliation order is no more than a precursor to an action over the merits of the dispute. In *Tswelopele Non-Profit Organisation & others v City of Tshwane Metropolitan & others*,¹⁰ the court dealt with the nature of the *mandament* and remarked:

“Its object is the interim restoration of physical control and enjoyment of specified property—not its reconstituted equivalent.”

[22] *Mandament* 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 20¹¹ and 22¹² 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 a spoliation order satisfy the requisites for the order.

Whether the applicant was in possession of the goats

⁹ 1989 (1) SA 508 (A) at 511H-I.

¹⁰ 2007 (6) SA 511 (SCA).

¹¹ S 20 of the Criminal Procedure Act 51 of 1977 provides: “**20 State may seize certain articles**

The State may, in accordance with the provisions of this 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; (b) which may afford evidence of the commission of an offence, whether within the Republic or elsewhere; or (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.”

¹² S 22 of the Criminal Procedure Act 51 of 1977 states: “**22 Circumstances in which article may be seized without search**

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 of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or (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; and (ii) the delay in obtaining such warrant would defeat the object of the search.”

[23] The applicant alleges that he was in physical possession of the goats, which is denied by the respondent. In the founding affidavit, he avers that he keeps the goats in his homestead at Rayport Location, which turned out to be his aunt's homestead. He adds that "*at all material times hereto, I possessed these goats.*"

[24] In paragraph 8 of the answering affidavit, the respondent alleges that their investigations revealed that the homestead where the goats were kept does not belong to the applicant but to Ms Nkalitshana who indicated that she knows nothing about goats kept at her homestead. Strangely, the respondent filed no confirmatory affidavit by Ms Nkalitshana. In this regard, the respondent explained that Ms Nkalitshana was asked to depose to an affidavit but '*we have not in the short space of time available been able to get her affidavit*'. However, it is unclear what method of communication was used with Ms Nkalitshana by the police, where and when it was made to explain the short space of time the respondent refers to. The evidence shows that the goats were impounded on 30 May 2023 at Ms Nkalitshana's homestead, which is undisputed, and the answering affidavit was filed on 18 July 2023. For a month and a half, there has been no affidavit filed in this regard either by Ms Nkalitshana or the police officer who communicated with her.

[25] In his replying affidavit, the applicant asserted that Ms Nkalitshana is his paternal aunt and Mzwamajola, is his uncle. This is undisputed. It is further undisputed that the goats are kept at his uncle's homestead which is also Ms Nkalitshana's homestead. How he calls his aunt's homestead, is neither here nor there. The relevant question is whether he was in possession of the goats at the time

of spoliation. Moreover, the fact that the goats are kept at the applicant's uncle's and/or aunt's homestead does not mean that he is not in possession of same. He asserts that he sells the goats to earn a living, and that has not been disputed. He alleges that he stays at Rayport Location, Etna Administrative Area, Qumbu, and this is where the goats were seized.

[26] It is the respondent's case that when they approached the house where the goats were confiscated, they spoke to Mzwamajola. The police officers deny that the applicant is the owner of the goats. They allege that certain people claimed ownership of the goats. In paragraph 9 of the answering affidavit the deponent states:

"9. I can also confirm that there are people who have since identified some of the goats as theirs. We have called the applicant to come to Qumbu where the goats are impounded to meet the people, but he has since refused to do so."

[27] The respondent alleges that the applicant was called to meet the people but refused to do so. It remains undisputed that the applicant indeed went to the charge office to meet the alleged people but to his amazement, this was after the application had been launched and service of the application had taken place on the respondent. According to the applicant, when he presented himself at the police station on 11 July 2023 after the police officers had called him, he was arrested on charges relating to a firearm but nothing pertaining to the goats. He was released the following day without appearing in court. This was uncontroverted. The people referred to by the police officers remain nameless and faceless. They filed no confirmatory affidavits.

[28] Moreover, to submit that the applicant is not the owner ignores the fact that it is physical possession that is protected and not the right to possession. The fact that the applicant's possession is, according to the respondent, wrongful or illegal, is irrelevant. That is because a good title is irrelevant, the respondent cannot contest the applicant's title to the goats. Restoration of the thing may even be to a person who might eventually be a thief or robber.

Whether the applicant was unlawfully deprived of possession

[29] The applicant contended that the police did not tell him why they seized the goats. In response, the respondent alleged that the stock card presented by the applicant showed that he owns 33 goats. Cst Xego, the deponent to the answering affidavit and the police official who seized the goats, stated that after the police officers received information that the goats were kept at a certain homestead at Etna locality, '*...we immediately went to the homestead in Rayport where we indeed found a number of goats in the kraal.*' He does not disclose how many goats were seized. In paragraph 7 of the answering affidavit the deponent alleges that "*we suspected that the goats might have been stolen and since we got no credible explanation from the said Mzwamajola about the ownership we then decided to impound the goats so that an owner can come to claim them.*" According to him, the goats could not be returned to the applicant.

[30] In *Ivanov v North West Gambling Board*,¹³ the appellant's failure to produce a stock card is irrelevant in spoliation proceedings. It cannot on its own establish a reasonable ground for the belief that the stock was stolen, which may have justified the seizure of the stock in terms of section 20 of the CPA. Only the applicant disclosed the number of goats seized which remains undisputed. No confirmatory affidavit was filed in respect of Mzwamajola.

[31] In paragraph 13 of *Ngqukumba supra*, the Constitutional Court as per Madlanga J held:

"[13] It matters not that a government entity may be purporting to act under colour of law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all the principle of legality requires of state organs always to act in terms of the law. Surely then, it should make no difference that, in dispossessing an individual of an object unlawfully, the police purported to act under colour of the search and seizure powers contained in the Criminal Procedure Act [51 of 1977]. Non-compliance with the provisions of the Criminal Procedure Act in seizing a person's goods is unlawful. This unlawfulness, plus the other requirement for a spoliation order (namely, having been in possession immediately prior to the being despoiled) satisfy the requisites for the order."

[32] In paragraph [20] the learned Judge added:

"Without doubt the police play an important role in combating and preventing crime, conducting criminal investigations, maintaining public order, protecting, and securing the inhabitants of South Africa and their property and upholding and enforcing the law. Their endeavours in this regard should not be interfered with unduly. However, they, like everyone else, are subject to the Constitution, in particular – for present purposes – the rule of law. A failure to hold them to the Constitution strictly may have negative consequences: it may encourage them to be a law unto themselves. After all, police excesses are not unknown. Reading sections 68(6) (b) and 89(1) [of the CPA] in a manner that ousts the *mandament van spolie* may lead to a culture of impunity amongst the police. That is at odds with constitutionalism."

¹³ (312/2011) [2012] ZASCA 92 (31 May 2012) at para [18].

[33] From the time the goats were seized until the matter was heard, no one has been arrested for the theft of the goats. There is also no evidence that such a case is being investigated or opened. Instead, the respondent resorted to unlawfully despoiling the applicant. I am satisfied that the applicant has managed to satisfy both requirements of the *mandamus* that he was in peaceful and undisturbed possession of the goats and was unlawfully dispossessed of same. He is therefore entitled to the order sought.

[34] **In the circumstances, I issue the following order:**

- 1. The respondent is directed to restore the applicant's peaceful and undisturbed possession of the applicant's 70 goats within 72 hours of this order.**

- 2. The respondent's seizure of the applicant's 70 goats is hereby declared unlawful.**

- 3. The respondent is ordered to pay the costs of the application.**

JUDGE OF THE HIGH COURT OF SOUTH AFRICA: GQEBERHA

APPEARANCES:

Counsel for the Applicant: Adv S Mzileni

Instructed by: Z.P. Maketa Attorneys

Counsel for the Respondents: Adv P Mngandi

Instructed by: State Attorney

Date Heard: 27 July 2023

Judgment Delivered: 19 October 2023