



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number 00059/2023

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: NO
17 April 2023

In the matter between:

BABY DIKELEDI MOILA

Applicant

AND

**PAMELA ELEXANDRA
respondent**

First

THE MINISTER OF THE SOUTH AFRICAN POLICE

**MR BHEKI CELE
Respondent**

Second

THE STATION COMMANDER OF COSMOS

**POLICE STATION
Respondent**

Third

**PE NEMAFHONONI SEGEANT N. O
Respondent**

Fourth

Neutral Citation: *Baby Dikeledi Moila vs Pamela Alexandra and others* (Case number 00059/2023) [2023] ZAGPJHC 342 (17 April 2023)

Delivered: The order in this matter was handed down electronically by circulation to the parties' emails, and uploaded on caselines electronic platform on **13 April 2023**

and the reasons for the order delivered **17 April 2023**.

Summary: Application spoliation. The applicant releasing possession of the motor vehicle to the respondent on the basis of a purported court order. Document not a court order but a letter of demand issued in terms of Section 29 of the Small Claims Act.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an urgent spoliation application in terms of which the applicant seeks the restoration of a BMW 320i motor vehicle. The matter was initially heard on 19 February 2023 as an *ex parte* application. It was then struck of the roll for lack of service. After that the parties engaged in discussions with the view to resolving the matter amicably. This endeavour, having failed the applicant re-enrolled the matter for a hearing on 28 March 2023.

[2] On 28 March 2023 the matter served before Mabesele J who struck the matter from the roll and further directed that the applicant's attorneys should file an affidavit explaining Mr Madikane's role and involvement in the matter. The explanation from the

applicant's attorneys is that Mr Madikane was involved in the matter to assist with the administration of the litigation process.

[3] The matter served before this court again on 4 April 2023. On that day the applicant withdrew its case against the second, third and fourth respondent.

[4] Following the debate concerning the issue of whether the prayers in the notice of motion was properly formulated, the court granted the applicant leave to amend his notice of motion. The applicant was further directed to serve the notice of the amendment on the first respondent.

[5] The matter served before this court on 6 April 2023. The respondent appeared in person and opposed the application. She had not, in this regard filed any opposing papers. However, by consent of both parties the court ruled that the respondent be allowed to answer to the applicant's application by way of oral evidence.

[6] The applicant's Counsel, at the invitation of the court, indicated that it would not be necessary to reply to the respondent's application.

The background facts

[7] The controversy in this matter arises from what appears to have been a purchase and sale of the motor vehicle referred to above for R25, 000.00. The applicant contends

that until 17 February 2023 she was in a peaceful possession of the motor vehicle which she used for her scholar transportation business.

[8] The applicant states that on 17 February 2023 she was confronted by the police and the respondent whilst transporting minor children from school. They produced a document, which purported to be a court order.

The legal principles

[9] It is trite that the common law remedy of spoliation seeks to address the wrongful deprivation of another's possession of property. The underlying purpose of this remedy is to prevent self-help, whose consequence would undermine of the rule of law.¹

[10] It is also trite that the question of how the person obtained possession is irrelevant in as far as the spoliation remedy is concerned. The basic elements of a successful spoliation application are :

1. The applicant being in "peaceful and undisturbed possession of the property in question,"² and
2. That the dispossessed was unlawfully deprived of the possession.

[11] In *Ngqukumba v Minister of Safety and Security and Others*,³ the Constitutional Court commenting about the essence of the remedy of spoliation said:

¹ *Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA).

² *Kgosana and another, the Otto* 1991 [2] SA 113, (SCA).

³ [2014] ZACC 14 (15 May 2014) at para 10.

“The essence of the *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 spoiled 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 processes.”

[12] In determining whether dispossession was lawful or otherwise, the key question to answer is whether the person complaining about dispossession consented freely and genuinely in relinquishing possession. There are different ways in which spoliation may take place. In general, it may take place by way of force or threat thereof, including by deceit or theft.⁴

[13] Because of its underlying purpose of ensuring that no resort to self-help and ensuring the respect of the rule of law, spoliation remedy is inherently urgent. Having regard to the facts and the circumstances of this matter, I am of the view that this matter deserves to be treated as one of urgency.

Analysis

⁴ See *Stock Housing [Cape] Pty Ltd vs The Chief Executive Director, Department of Education and Cultural Services and Others* 1996 (4) SA 231 (C).

[14] The applicant contends in her founding affidavit that the manner in which she was deprived of the possession of the motor vehicle "was a behind the door approach to escape following the due process as permitted by the law."

[15] In my view based on a close scrutiny of the facts and the circumstances of this case, there is a clear indication that the spoliation in the present matter took the form of deceit. The applicant was deceived into believing that the respondent and the police had a court order authorizing them to take possession of the motor vehicle. In this respect the police and the respondent presented to the applicant with the letter of demand in terms of section 29 of the Small Claims Court Act, issued by the Small Claims Court Clerk.

[16] The defendant in her oral testimony did not dispute that the letter was presented to the applicant. She, however, contended that after stopping the applicant on the road, they went with her to her house where she allegedly took her belongings out of the motor vehicle and then handed the keys over to them freely and voluntarily.

[17] The fact that there was no resistance in handing the keys of the motor vehicle to the police or the respondent does not detract from the fact that the plaintiff did not genuinely consent to handing over the possession of the motor vehicle to the respondent. It was quite clear from the respondent's version that the applicant was throughout the controversy not willing to hand over the motor vehicle to the respondent. In this respect the respondent testified that she on previous occasions had telephoned

the applicant about having to return the motor vehicle and at some point the applicant stop answering calls.

Order

[18] In the premises the following order is made:

1. The application is heard as one of urgency in terms of Rule 6(12) condoning the non – compliance with the time limits for service of court documents.
2. The respondent is ordered to restore the physical possession of motor vehicle to wit the silver BMW 320i with registration number 54YVGP motor to the applicant, with immediate effect.
3. In the event the respondent fails or refused to comply with the order in 2 above, the Sheriff of this court is authorized and directed to enforce the aforesaid order by removing the aforesaid motor vehicle being the silver BMW 320 bearing the registration number 54 YV GP from the unlawful possession of the said respondent.
4. The first respondent to pay the applicant's costs on party and party scale.

E Molahlehi

Judge of the High Court of
South Africa, Local
Division, Johannesburg.

APPEARANCES:

Counsel for the applicant: Adv. L Moela

Instructed by: Makhubela Attorneys

Respondent in person: Ms. Pamela Alexandra

Date heard: 06 April 2023

Date of order: 13 April 2023

Date of the reasons: 17 April 2023.