



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: **11 October 2022** Signature:

Case Number: 31325/2022

In the matter between:

ECODIESEL (PTY) LTD

(Registration No. 2012/131889/07)

First Applicant

VG FUEL SOLUTIONS (PTY) LTD

(Registration No. 2020/131354/07)

Second Applicant

AMERALD DISTRIBUTORS (PTY) LTD

(Registration No. 2015/017682/07)

Third Applicant

SHESHA FUELS (PTY) LTD
(Registration No. 2017/239822/07)

Fourth Applicant

and

CLS CLARKE LOGISTICS SOLUTIONS (PTY) LTD
(Registration No. 2017/229488/07)

First Respondent

JEAN-PIERRE CLARKE
(Identity No. 730201 5502 084)

Second Respondent

JACOBUS ALWYN HENDRIK BESTER
(Identity No. 790207 5017 087)

Third Respondent

LIQUID GOLD OUTSOURCING (PTY) LTD
(Registration No. 2022/320116/07)

Fourth Respondent

JUDGMENT

NYATHI J

A. Introduction

- [1] This is an urgent application for a spoliation order. The basis for the application is that the Second Applicant is being deprived of the possession of its truck, trailer and the diesel contained therein which is in First Respondent's custody.
- [2] The Applicant seeks an order in the following terms:
- 2.1 That this application be heard as an urgent application in terms of Rule 6(12) and that the necessary condonation be granted to the Applicants in respect of the non-compliance with the prescribed time limits, forms and service;
 - 2.2 That the First, Second and Third Respondents be ordered to immediately restore the Applicants' possession of the truck with registration number CY 341863, the trailer with registration number JR 02 WY GP and the diesel inside the trailer, by allowing the Applicants to leave the premises of the First Respondent situated at 2nd Flamink Road, Alrode, Johannesburg, Gauteng;
 - 2.3 That the First, Second and Third Respondents, jointly and severally, the one paying the other to be absolved, be ordered to pay the Applicants' costs on an attorney and client scale;

B. The Parties involved:

- [3] The First Applicant is ECODIESEL (PTY) LTD (Registration No. 2012/131889/07), a company duly registered and incorporated in terms of the Company Laws of South Africa with registered address situated at 30 Zeldre Place, Landskap Street, Kempton Park, Gauteng.
- [4] The Second Applicant is VG FUEL SOLUTIONS (PTY) LTD (Registration No. 2020/131354/07), a company duly registered and

incorporated in terms of the Company Laws of South Africa with registered address situated at 93 Main Road, Hermanus, Western Cape Province.

- [5] The Third Applicant is AMERALD DISTRIBUTORS (PTY) LTD (Registration No. 2015/017682/07), a company duly registered and incorporated in terms of the Company Laws of South Africa with registered address at 99 Main Road, Old Standard Bank Building, 1st Floor 663, Hermanus, Western Cape Province.
- [6] The Fourth Applicant is SHESHA FUELS (PTY) LTD (Registration No. 2017/239822/07), a company duly registered and incorporated in terms of the Company Laws of South Africa with registered address situated at corner Malibongwe and Northumberland Road, Northriding, Randburg, Gauteng.
- [7] The First Respondent is CLS CLARK LOGISTICS SOLUTIONS (PTY) LTD (Registration No. 2017/229488/07), a company duly registered and incorporated in terms of the Company Laws of South Africa with registered address and principal place of business situated at 2 Flamink Road, Alrode, Alberton, Gauteng.
- [8] The Second Respondent is JEAN-PIERRE CLARK (Identity No. 730201 5502 084), a major male businessman and director of the first respondent with principal place of business situated at 2 Flamink Road, Alrode, Alberton, Gauteng.
- [9] The Third Respondent is JACOBUS ALWYN HENDRIK BESTER (Identity No. 790207 25017 087), a major businessman and director of the First Respondent with principal place of business situated at 2 Flamink Road, Alrode, Alberton, Gauteng.

[10] The Fourth Respondent is LIQUID GOLD OUTSOURCING (PTY) LTD (Registration No. 2022/320116/07), a company duly registered and incorporated in terms of the Company Laws of South Africa with registered address situated 33 Van Riebeeck Avenue, Alberton, Johannesburg, Gauteng.

C. Background to the application:

[11] The Second Applicant was at all material times in undisturbed possession of a truck with registration number CY 341863 (“the truck”), a trailer with registration number JR 02 WY GP (“the trailer”) and 38000 litres of diesel inside the trailer (“the diesel load”). The possession of the diesel load was on behalf of the First, Third and Fourth Applicants. As such there was joint possession of the diesel load between all the Applicants.

[12] On 3 June 2022 the First Respondent took the law into its own hands and dispossessed the Applicants by preventing the truck and trailer from leaving the premises of the First respondent. The purpose of this application is to immediately restore the possession of the Applicants.

[13] The First, Third and Fourth applicants are wholesale fuel distributors. The Second applicant is the owner of the truck and trailer that was used for the purposes of transporting the diesel load to the premises of the First Respondent.

[14] The Fourth Applicant utilised the services of the Second Applicant to transport diesel.

D. The cause of the dispute:

- [15] A person alleging to represent the Fourth Respondent defrauded both the Fourth Applicant and the First Respondent. In essence an order was fraudulently placed with the Fourth Applicant. At the same time an offer was fraudulently made to the First Respondent indicating that the Fourth Respondent would sell fuel to the First Respondent. At the time when this fraud was perpetrated, neither the Fourth Applicant, nor the First Respondent knew anything about it.
- [16] It is common cause that no agreement was concluded between the Fourth applicant (or any of the other Applicants) and the First Respondent.
- [17] Based on the fraudulent actions of third parties, the First Respondent has effected a payment into a bank account utilised by the fraudsters. After making the aforesaid payment, the First Respondent refused to allow the truck and trailer to leave the premises of the First Respondent.
- [18] In essence the First Respondent resorted to self-help in a quest to recoup the money he was misled to pay, or to obtain value equal to it.
- [19] The purpose of this application is to restore complete possession of the truck, trailer and the diesel load to the Applicants by allowing the truck and trailer to leave the premises of the First Respondent.

E. Urgency:

- [20] Applicants motivated for the matter to be dealt with on an urgent basis. This has been strongly opposed by the Respondents.

[21] In *Willowvale Estates CC and another v Bryanmore Estates Ltd 1990 (3) SA 954 (W) at 958* it was held that spoliation is normally an urgent matter. This does not mean a spoliation application is *per se* urgent.

[22] What is easy to discern in this matter is that commercial interests are also part of the issues to be considered.

[23] I therefore exercised my discretion and heard the matter as one of urgency.

F. The law on spoliation:

[24] The *mandament van spolie* (spoliation order) being sought here, is a common law remedy. Its purpose is to promote the rule of law and discourage ‘self-help’¹.

[25] It has been recognised by our courts from way back in the early twentieth century. In *Nino Bonino v De Lange*, Innes CJ articulated the principle underlying the *mandament van spolie* as follows:

‘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 wrongfully and against his consent of the possession of 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 inquiry or investigation into the merits of the dispute.’

[26] Thus the requirements for a spoliation order are that the aggrieved spoliated possessor must have been:

22.1 In peaceful and undisturbed possession;² and

22.3 Was unlawfully deprived of the possession.³

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

² See *Kgosana and Another v Otto 1991 (2) SA 113 (W)*

³ See *Lau v Real Time Investments 165 CC [2019] ZAGPPHC 313 (Unreported case No. 50134/2019) 165 (GP) – per Millar AJ (as he then was)*.

G. Applicant's version:

- [27] On 3 June 2022 a truck and a trailer containing 38000 litres of diesel arrived at the premises of the First Respondent ("Clark"). Shortly thereafter Clark made a payment to an account of the Fourth Respondent ("Liquid Gold"). A person who identified herself as "Samantha" orchestrated a fraud against both the Fourth Applicant ("Shesha") and Clark. It was the fraudulent conduct that caused both the Applicants' conduct and the payment from Clark.
- [28] Samantha earlier placed a fraudulent order with Shesha, creating the false impression that she represented Clark. Samantha also fraudulently indicated to Clark that Liquid Gold will sell diesel to it and deliver it at its premises.
- [29] When the truck arrived at the premises of Clark, the representatives of Clark proceeded to test the diesel and, when satisfied with the quality, Clark proceeded to effect payment to an account held by Liquid Gold.
- [30] When Shesha did not receive any payment, the driver of the truck was instructed to leave the premises of Clark. When he attempted to do so, other vehicles were parked around the truck and trailer preventing it from leaving the premises of Clark.

H. Respondents' version:

- [31] In their answering affidavit, deposed to by Jacobus AH Bester, the Respondents raise a number of disputes. Primarily they challenge the Applicants' ownership of the truck and trailer. The allegation is that the second applicant ("VG Fuel") is not the true owner of the truck and trailer.

[32] The Respondents further tenders to allow the truck and trailer to leave the premises on condition the diesel is delivered to Clark.

I. Application of the law to the facts:

[33] The issue of ownership in an application for a spoliation order is not relevant. Mere possession suffices. The remedy is based on and expressed in the maxim '*spoliatus ante omnia restituendus est*' – the spoliated person must be restored to his or her former position before all else. That is before any question of title can be considered.⁴

[34] There is thus no requirement for the Applicants' title over the truck, trailer and diesel to be proven and authenticated. It is trite that even a thief⁵ could properly institute proceedings for relief provided he meets the requirements already discussed above.⁶

[35] The Respondents' "tender" to release the truck and trailer is nothing but a contrived mechanism to enforce delivery of the diesel to Clark, thus obtaining value for the moneys it had lost and shifting the onus to trace the elusive wrongdoer "Samantha" for the money.

[36] It is an undeniable fact that Clark fell victim to an elaborate well-orchestrated scam and paid a large sum of money that has disappeared.

[37] Having considered the affidavits filed of record and the submissions from the parties' Counsel, I make the following order:

(i) The First, Second and Third Respondents are ordered to immediately restore the Applicants' possession of the truck with registration number CY 341863, the trailer with registration number JR 02 WY GP and the

⁴ Wille's Principles of South African Law P454 – F. du Bois *et al.*

⁵ Voet 41.23.16, 43.16.3 (Sourced from Wille's Principles).

⁶ Para [26] *supra*.

33 000 litres of diesel inside the trailer, by allowing the Applicants truck and trailer to leave the premises of the First Respondent situated at 2nd Flamink Road, Alrode, Johannesburg, Gauteng.

- (ii) That the First, Second and Third Respondents are ordered to pay the Applicants' costs on an attorney and client scale, jointly and severally, the one paying the other(s) to be absolved.

J.S. NYATHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 30 June 2022

DATE OF JUDGMENT: 11 October 2022

APPEARANCES

For Applicants: Adv. A.P.J Els.

087 092 5543 / 083 455 6579

e-mail: apjels@lawcircle.co.za

Stofberg Attorneys

Faerie Glen

PRETORIA

c/o Thomas@stofberglaw.co.za

FOR THE RESPONDENTS: Adv. G. Naude

Van Zyl Kruger Attorneys