

Reportable:	YES / <b>NO</b>
Circulate to Judges:	YES / <b>NO</b>
Circulate to Magistrates:	YES / <b>NO</b>
Circulate to Regional Magistrates:	YES / <b>NO</b>



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTHERN CAPE DIVISION, KIMBERLEY**

**CASE NO: 99/2023**

In the matter between:

**LEADER TRAILER BODIES (PTY) LTD**

**Applicant**

and

**MARTHINUS JOHANNES NAUDE**

**First Respondent**

**HENKO NAUDE  
Respondent**

**Second**

**REASONS**

**CHWARO AJ:**

**Introduction**

[1] This application concerns the restoration of possession of a trailer that was removed by the respondents from certain premises situated at

46 Karakoel Street, Upington. After hearing submissions on behalf of the parties, I made an order in the following terms:

- “1. The requirements as to form and service provided for in the Uniform Rules of Court be and are hereby dispensed with and the matter is heard as one of urgency in terms of Rule 6(12).
2. The First and Second Respondents are directed to restore possession of the 2020 Leader Trailer Bodies Side Tipper Interlink trailer with chassis number: AA9S236KAMBVB2003 and AA952366KAMBVB204 to the Applicant at the following address: Northern Cape Truck & Trailer (Pty) Ltd, 46 Karakoel Street, Upington.
3. The First and Second Respondents are to bear the costs of the application.”

[2] Having granted the order detailed in the preceding paragraph, I intimated that any of the parties seeking reasons should do so in accordance with the applicable rules of Court. The respondents subsequently filed a request for reasons through a notice contemplated in rule 49(1)(c) of the Rules of Court<sup>1</sup>. These are the reasons.

## **Background**

[3] The applicant is a Gauteng-based outfit conducting business of, amongst others, supply of mechanical parts and repairs and maintenance of tipper trailers that are normally utilised in the road transport industry. The first respondent, a Free State-based businessman, operates a transportation business of various commodities utilising a trailer, similar to the kinds that are usually serviced, repaired and maintained by the applicant.

[4] During October 2022, the applicant supplied certain mechanical parts and effected repairs to the brake system distribution on the first respondent's trailer, as fully described in the order reproduced in

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<sup>1</sup>The notice is dated 3 February 2023

paragraph 1 above. In consideration for the supply of its mechanical parts and services rendered, the applicant issued an invoice to the first respondent in the amount of R80 220-21.

[5] The applicant contends that the said amount was payable in full within two days after taking delivery of the trailer, with the applicant's ownership of the parts being retained until full payment is made. The trailer was released to the first respondent on 17 October 2022.

[6] The first respondent did not make payment to the applicant as allegedly agreed. He instead complained about the poor workmanship on his trailer. According to the applicant, the first respondent was informed that the parts installed on his trailer were under warranty and was thus invited to return the trailer to the applicant's premises, presumably for the replacement of the parts. He failed to do so. On the other hand, the first respondent contends that he only became aware about the parts being under warranty, after their dispute arose and he considered the invitation to return the trailer as a ruse employed by the applicant to regain possession of the trailer and effectuate his right of retention.

[7] Ultimately during November 2022, the applicant caused a letter of demand to be issued in terms of which payment of the outstanding amount was sought from the first respondent. Soon thereafter and during December 2022, summons commencing action for the recovery of the said amount was issued out of the Magistrates Court, Bethlehem by the applicant against the first respondent.

[8] The dispute leading to the launching of this application began in earnest from 9 January 2023, after Mike van den Berg of the applicant, ("*van den Berg*") was informed by a certain Jurgens Coetzee ("*Coetzee*") of Northern Cape Truck and Trailer, ("*NCTT*") , situated at 46 Karakoel Street, Upington, that the first respondent brought his trailer for repairs at the said premises.

[9] On the following day, 10 January 2023, van den Berg informed Coetzee that the first respondent had an outstanding debt with the applicant relating to the repair works effected on the former's trailer and further informed Coetzee to ensure that the trailer which the first respondent delivered at the premises of NCTT is not removed as the applicant intended to exercise its right of retention over the trailer in respect of the outstanding debt.

[10] This, according to van den Berg, was done as NCTT was the authorised agent of the applicant, a fact that was communicated to the first respondent over a period of 10 to 11 January 2023. The first respondent disputes the nature and extent of the alleged agency relationship between the applicant and NCTT.

[11] On 10 January 2023, the applicant's attorneys sent out correspondence to the first respondent not only seeking payment of the outstanding amount but also informing the first respondent of the applicant's exercise of its right of retention over the trailer that was at the premises of NCTT and that same would only be released upon payment of the outstanding amount.

[12] Three days later, on 13 January 2023, the second respondent attended to the premises of NCTT and despite Johan Potgieter ("*Potgieter*") of NCTT informing him and his legal representatives about the applicant's right of retention over the trailer, on instructions of the first respondent, the second respondent nonetheless removed the trailer from NCTT premises.

[13] Dissatisfied about the conduct of the respondents, on 16 January 2023, the applicant's attorneys directed correspondence to the respondents' attorneys informing them about what their client perceived to be the unlawful deprivation of the trailer by the second respondent

without legal recourse and demanding the return of the trailer by 17 January 2023. The trailer was not returned and hence the institution of an urgent application on 19 January 2023.

[14] The respondents opposed the application on the strength of lack of urgency, that the applicant did not exercise any possession over the trailer during the relevant period in January 2023 as it failed to demonstrate the extent of the agency relationship between it and NCTT and lastly that his recovery of the trailer on 13 January 2023 was an act of contra-spoliation.

## **Discussion**

### **Urgency**

[15] At the commencement of the hearing, I expressed a firm view that since the application involved an alleged unlawful dispossession of a trailer that was placed in possession of the applicant through its agent, the facts alleged by the applicant in support of the application for condonation to dispense with the usual rules relating to form and service, though not fully satisfactory, nonetheless met the threshold for consideration of the matter on truncated time frames.

[16] There was no formidable difference of opinion with the sentiments that I expressed, regard being had to the date when the alleged dispossession took place, the engagements between the parties subsequent thereto and ultimately the decision taken by the applicant to approach this Court to ventilate its claim to possession of the trailer in enforcing its right of retention.

[17] Despite the respondents having taken a preliminary point relating to the lack of urgency of the application, I held a view that the facts adduced by the applicant tilted the scales in favour of the application being heard

in accordance with the provisions of rule 6(12)(b) of the Uniform Rules of Court., hence the matter proceeded on that understanding, with the parties proceeding to deal with the substantive merits of the application.

[18] The view taken regarding urgency is informed by established case law on the matter and the very nature of the relief being sought herein, that of speedy determination of the competing interests of the parties relating to the entitlement to physical control over the trailer, which is the subject matter of the application. These considerations are, ultimately determined against the backdrop of substantial prejudice which the applicant stands to suffer if the matter was to be heard in the ordinary course.<sup>2</sup>

### **Whether the applicant was spoliated**

[19] In **Ngqukumba**<sup>3</sup>, the Constitutional Court described the essence of a spoliation remedy in the following terms:

“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 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”.

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<sup>2</sup>Vide *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd* [2011] ZAGPJHC 196 (23 September 2011)

<sup>3</sup>*Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) at para 10. See also *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) at para 22.

[20] The substantive requirements that must be met by a party seeking restoration of possession premised on *mandament van spolie* are trite. These are, firstly prove that such a party was in peaceful and undisturbed possession of the property and secondly, that such a party was deprived of possession unlawfully against such party's consent.<sup>4</sup>

[21] On a closer analysis of the common cause facts, it is apparent that the first respondent remains indebted to the applicant in the amount of R80 220-21, in respect of the supply of parts and services rendered on its trailer. The trailer was delivered to the first respondent on 17 October 2022.

[22] Though the first respondent sought to attack the nature and extent of the applicant's agency relationship with NCTT, it was repeatedly made clear to the first respondent, during the period 10 to 11 January 2023, that the applicant was exercising its right of retention over the trailer through NCTT, its authorised agent. This much is not disputed except for a terse attempt at seeking to assail the said agency agreement.

[23] In my view, the dispute sought to be raised by the respondents regarding the propriety of the agency agreement does not amount to a real, genuine and *bona fide* factual dispute that would disentitle the applicant of its claim of having physical control over the trailer through its agent.<sup>5</sup>

[24] The respondents could not proffer any solid argument to counter the existence of the agency agreement, especially seen against the fact that the applicant was informed by the NCTT representative that the first respondent's trailer was delivered at its premises for repairs and the emphatic instructions given to NCTT not to release the trailer as the applicant intended to exercise its right of retention over it.

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<sup>4</sup>Yeko v Qana 1973 (4) SA 735 (A) at 739E-F and Blendrite (Pty) Ltd and Another v Moonisami and Another 2021 (5) SA 61 (SCA) at para 6

<sup>5</sup> Vide Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

[25] It is settled law that physical control over a property may not only be exercised by the possessor himself but may be done through an agent. In **Mbuka**,<sup>6</sup> the court analysed various authorities about possession of a thing through an agent and concluded that for as long as the agent possesses the thing not for the agent's own benefit but for the benefit of the principal, then in that case, where the agency is established, the possessor can be said to have exercised undisturbed and peaceful possession, through an agent.

[26] The applicant's intention to exercise physical control over the trailer through NCTT, its agent, was expressly communicated to the first respondent's attorneys, who would have advised the first respondent to challenge such an assertion through the legal process, if indeed the first respondent was adamant in his resolve that the alleged agency relationship between the applicant and NCTT amounted to a ruse aimed at deceiving him to part ways with his trailer. His available option was an application to court for an appropriate relief, rather than resorting to self-help.

[27] On the basis of the foregoing, I concluded that on 13 January 2023, when the trailer was removed from NCTT's premises on the instruction of the first respondent, such removal constituted an unlawful dispossession of the trailer from the applicant, who was in peaceful and undisturbed possession of the trailer, through its authorised agent, the NCTT.

[28] In the absence of any order by a competent court to that effect or consent from the applicant, the first and second respondents did not have any lawful basis to remove such a trailer from NCTT. The conduct of the second respondent, who acted at the behest of the first respondent, to forcefully remove the trailer from the premises of NCTT, was typical self-

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<sup>6</sup>Mbuka v Mdinwa 1982 (1) SA 219 (Tk) at 221A et seq



help which flies against the true essence of what the *mandament van spolie* mechanism seeks to achieve.

### **Counter-spoliation**

[29] The respondents' alternative defence of counter-spoliation cannot be upheld. The facts established that immediately after the applicant became aware of the first respondent's trailer being at the premises of NCTT, the applicant instructed NCTT, as its agent, not to release it as it intended to exercise a lien over it.

[30] The exercise of physical control over the trailer by the applicant was duly communicated to the first respondent's attorneys on 10 January 2023 through a letter from the applicant's attorneys where, at paragraph 2 of the letter, the following is emphatically stated:

“2. Our client informed us that it is in control and in possession of your client's 2020 Leader Trailer Bodies Side Tipper Interlink with chassis Numbers: AA9S236KAMBVB2003 & AA9S236KAMBVB2004..”

[31] On the established facts, it cannot avail the first respondent that its conduct of 13 January 2023 amounted to counter-spoliation. This is because the purported counter-spoliation occurred some 3 days after the first respondent becoming aware of the applicant's physical control over the trailer through its agent. The conduct of the second respondent, who was acting on behalf of the first respondent, to aggressively remove the trailer despite attempts by two of the NCTT employees to prevent him, clearly indicates an act of self-help rather than counter-spoliation, done immediately after becoming aware of the facts.

### **Conclusion**

[32] It was on the basis of the foregoing reasons that I concluded that the applicant made out a case for the relief sought and consequently granted the order referred to in paragraph 1 above.

**O.K. CHWARO  
ACTING JUDGE OF THE HIGH COURT  
NORTHERN CAPE DIVISION, KIMBERLEY**

**DATE OF HEARING: 23 January 2023**  
**DATE OF REASONS: 09 February 2023**

**REPRESENTATION:**

**For the Applicant: Adv. M. Meyer  
Instructed by:  
Anders Incorporated, Pretoria  
Duncan & Rothman Inc, Kimberley**

**For the Respondents: Adv. A. Eillert  
Instructed by:  
Van Aardt & Van der Walt  
Attorneys, Bethlehem  
Elliot Maris Attorneys, Kimberley**