IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO. 1182/2021

Reportable

In the matter between:

NONCEDILE OBENA	**Applicant**
and	
THE MINISTER OF POLICE	**1st Respondent**
THE STATION COMMANDER,	**2nd Respondent**
TINA FALLS, LIBODE	
THE SHERIFF, QUMBU	**3rd Respondent**
NOLUYANDA MADIKANE-OBENA	**4th Respondent**
PAMELLA ZIDE	**5th Respondent**

JUDGMENT

MBENENGE JP:

Introduction

[1] The subject matter of this application is a Toyota Corolla bearing registration letters and numbers BJ[…][1] (the motor vehicle), and two supersonic speakers (the speakers).[2] The items form part of the estate of the late Lusindiso Obena (the deceased), who met his demise on 1 September 2019.

[2] The dispute at hand involves the applicant and the fourth respondent as contestants and is a scramble for possession of the motor vehicle and the speakers.

[3] The applicant is a resident of Ngwenyama Locality, Qumbu, and the mother of the deceased.

[4] The fourth respondent is surviving spouse of the deceased with whom she was married by civil rights on 5 February 2018.

Background

[5] The motor vehicle and the speakers were removed from the homestead wherein the applicant resides (the homestead) by the fourth respondent acting in concert with members of the South African Police Service (the police), on 11 March 2021.

[6] Following this incident, there was an exchange of correspondence between the parties through their attorneys of record. In this correspondence, the fourth respondent acknowledged that the items were, at all times relevant hereto, under the control of the applicant.[3] The fourth respondent's unrelenting stance was also that, as the surviving spouse, she was ""*entitled*" . . . *to be now the owner*." In one of the letters, the demand for the release of the items was made on pain of "*moving an application to the high court*," which "*would*

[1] According to a copy of the relevant certificate of registration, annexed to the fourth and fifth respondents' answering affidavit, the current registration letters and numbers of the motor vehicle is "*PKG 708 GP*".
[2] The motor vehicle and the speakers are otherwise collectively referred to as "*the items*."
[3] According to the letter "*the above motor vehicle*" is "*under your late son*", "*2 supper (sic) sonic speakers belonging to them are in* '[the fourth respondent's] *possession* '" and she is "*refusing to release* [them]".

render applicant liable for legal costs in (sic) a punitive scale." On behalf of the applicant it was stated that she was "*inclined to settle the matter*", but "[needed] *to obtain all the relevant information to make an informed decision in respect thereof*."[4] Nothing concrete eventuated beyond this point. More about this later.

The seizure challenged

[7] The applicant thereafter launched the instant proceedings seeking, by way of urgency, an order declaring the dispossession[5] of the items unlawful and unconstitutional, as also a *mandamus* that "*the respondents be directed to restore* [to her] *possession . . .of* [the items]."

[8] By the time the application served before me, the fourth and fifth respondents had delivered their answering affidavit. The rest of the respondents, who had no complicity in the acts complained of, have not opposed the application. Mr *Malala*, who appeared for the applicant, was content to argue the application without the delivery of an affidavit in reply to the answering affidavit. Regard being had to the speedy nature of the relief sought, and in the midst of a huge motion court roll,[6] I invited the parties to advance argument on the understanding that no further affidavits would be delivered, which they did. Judgment was reserved, but purely for the sake of completeness, the parties were afforded the opportunity to thereafter file heads of argument, which they have done.

The applicant's case

[9] Stripped of verbiage, the applicant's case is that she took possession of the motor vehicle and the speakers from the deceased when the latter was

[4] The correspondence was exchanged between 5 February 2021 and 24 February 2021.
[5] "*Dispossession*" and "*seize*" are used interchangeably.
[6] There were no less than 170 matters enrolled for hearing in motion court.

leaving for the labour centres, Rustenburg, in January 2019. The motor vehicle was utilised "*for family needs*," and the speakers "*for social entertainment*."

[10] The applicant contends that at about 16h00 on 11 March 2021, she was dispossessed of the items by "*the respondents*", who, upon invading the homestead, forcefully seized the motor vehicle and the speakers, after demanding the motor vehicle's keys, which she surrendered amidst resistance. The seizure, laments the applicant, was unlawful in that the items were not liable to be seized. It is further contended that the actions of the respondents constituted a breach of the applicant's rights to "*privacy, property,* [and] *dignity enshrined in the Bill of Rights*."

The fourth respondent's case

[11] The version of the fourth respondent is straightforward. A while after the demise of the deceased, and by "*Letters of Authority*" issued by the Master of the High Court, Mthatha on 18 February 2021, she was authorised to take control of the assets of the estate of the deceased reflected in an inventory embodied in the Letters. The inventory comprises:

Assets	**Amount**
1. Unclaimed monies Ref 20014077- Sibanye Stillwater	R125 755.47
2. PKG 708 GP - Toyota Corolla	R68 000
3. Personal effects (speakers) – Speakers	R6 000

[12] On the strength of the authorization, she, in the company of law enforcement officers, one of whom was the second respondent, attended upon the homestead whence the items were removed. The homestead is said to be "*the common home belonging to the deceased's grandmother, Mamxolwa Obena, which the applicant* [is occupying] *as her homestead*."

[13] The fourth respondent denies that the applicant was in possession of the items. In amplification thereof, she states that after the deceased had purchased the motor vehicle in Rustenburg, it was brought to Qumbu, where it was parked in a garage that she and the deceased had built at the homestead. On occasion, when back home, Qumbu, she and the deceased would use the motor vehicle. It was parked there with strict instructions that no one uses the motor vehicle without her and the deceased's permission. The only person permitted to drive the motor vehicle was Dompass Gqokoma. The applicant kept the car keys, which she was entrusted by the fourth respondent for safekeeping, and was at no stage authorised to use the motor vehicle and the speakers.

[14] Furthermore, the fourth respondent deplores the citation of the respondents who had no complicity in the acts complained of in these proceedings. The third respondent, she says, never seized the items or instigated the impugned seizure. The fifth respondent was also not involved in seizing the items.

Issues for determination

[15] Flowing from the above, the issues that have arisen for determination are-

(a) whether the applicant was in possession of the items at the time of the impugned dispossession;
(b) whether the dispossession was lawful; and
(c) what costs order should be made.

[16] Subject to what is stated herein below, it is available to a litigant to apply not only for spoliatory relief, but also a declaratory order as to the applicant's own rights.[7]

[7] For example in *Scoop Indutsries (Pty) Ltd v Laanglagter Estate and GM company Ltd* 1948 (1) SA 91 (W), the applicant sought a *mandament van spolie* together with an order declaring that he was the owner of some of the articles that had been seized.

The issues adumbrated above make it plain that what is central to these proceedings is whether the *mandament van spolie* should be granted, or not. In my view, but for the quest for an order declaring the seizure unconstitutional (as against being merely "*unlawful*") as well, the *manadament van spolie*, also justiciable in the Magistrates'Courts,[8] would suffice. This is so because an affirmative answer to the enquiry into the unlawfulness of the dispossession of the items concerned is, strictly speaking, and subject to the second requisite being fulfilled, capable of disposing of the case without the need for an order declaring the dispossession unlawful. Otherwise the applicant in spoliatory proceedings would be at liberty to simulateneously seek an order declaring, for example, that he was in possession of the item when it was being seized. That would not only make non-sense of the object of a declatory order but would negate the self-sufficient nature of the *mandament van spolie*, whose object is mainly restoration of the despoiled article.

[17] A determination that the applicant was in possession of the items and that his dispossession thereof was unlawful would render the declaratory relief superfluous and bereft of any practical effect on the parties or on others.[9] Also, a declaratory order of unlawfulness would be a mere statement of the law as enshrined in the requisites for the grant of a *manadament van spolie*. The absence of a controversy regarding the relevant legal position and the availability of other remedies[10] are factors against granting a declaratory order in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013.[11]

[8] Depending on the value of the subject matter (see section 30(1) read with section 29(1)(g) of the Magistrates' Court Act 32 of 1944).
[9] *President of the Ordinary Court Martial and Others v Freedom of Expression Institute and Others* [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 at para 16.
[10] In this instance, the *manadament van spolie.*
[11] Herbstein and Van Winssen: The Civil Practice of the High Courts and the Supreme Court of Appeal (Vol 1) (5th Ed) 2009 pp 1438 – 1440; also see *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v Director of the Financial Intelligence Centre* [2017] ZAGPPHC 576; [2017] 4 All SA 150 (GP); 2018 (3) SA 515 (GP).

[18] Section 172 (1)(a) of the Constitution makes it obligatory for Courts to declare conduct found to have been inconsistent with the Constitution unconstitutional.[12] This by no means imply that an invocation of the section eschews the Court's discretion. Purely because no issue was made of the appropriateness or otherwise of the quest for relief declaring the seizure unconstitutional, consideration will be given thereto.

Thus, in addition to the issues outlined above, there is a further issue, which is whether the conduct complained of constituted a breach of the applicant's constitutional rights to dignity, privacy and property.

Requirements for a manadament van spolie

[19] Two factors are requisite to found a claim for an order for restoration of possession on an allegation of spoliation, namely, first, whether the applicant was in possession of the object and, second, whether the applicant was unlawfully deprived of that possession.[13]

Was the applicant in possession of the items?

[20] The law lays down certain requirements before a person is deemed to be a possessor in order for the consequences to realise. The specific content of possession depends on the context within which and the purpose for which it is employed.[14] Determining whether possession has indeed been established depends on all the facts and circumstances of a particular case. This already daunting task is exercebated when facts are scant and conflicting versions are

[12] Section 172(1)(a) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court –
> (a) must declare that any . . . conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency . . . "

[13] *Yeko v Qana* 1973 (4) SA 735 (A) 739E; *Mdlulwa v Gwija* 1992 (3) SA776 (Tk) and *Plaatjie v Olivier* 1993 (2) SA 156 (O).

[14] Silberberg and Schoeman's, The Law of Property (6th ed), p 310-1.

presented before court. However, where, as here, the facts are common cause or not in dispute, the task is made easier.

[21] It was argued by Ms *Zide*, on behalf of the fourth and fifth respondents, that the possession of the items, in this case, was not of a kind that warrants the protection accorded by the remedy. For this submission, reliance was placed on *Mbuku v Mdinwa*,[15] where Hefer CJ held:

> "In any event, I am of the view that an agent who has no interest in the property which he holds for his principal, or who derives no benefits from holding it, is not entitled to claim the relief of a *mandament van spolie*. One should not forget that it is a remedy which is available to a possessor; it has never, to my knowledge, been extended, except perhaps inadvertently, to a mere *detentor* but the *animus possidendi* which is required to transform detention into possession is not the intention required of old for so called civil possession; it is no more than the intention to hold the thing in question for one's benefit and not for another. And a *detento*r who does not have that intention is indeed merely a *detentor*."[16]

[22] It was accordingly argued that the applicant, having been a mere *detentor*, derived no benefit from holding the items, and was thus not in possession thereof at the time of the impugned seizure.

[23] Although the weight of authority has hitherto supported the view that, to qualify as a possessor in spoliation proceedings, the holder must have the intention to hold for his benefit,[17] the case law and legal writings on this subject have not been unanimous.[18]

[24] In *Agha v Sukan*,[19] Alkema AJ (as he then was) dealt with the situation where the assets concerned were spoliated after the deceased's death and, relying, *inter alia*, on *Van der Merwe*,[20] said:

---

[15] *Mbuku v Mdinwa* 1982 (1) SA 219 (Tk) at 332 - H.
[16] Also see *Mdlulwa and Another v Gwija* (above n 13).
[17] *Mbuku* (above n 15); *Mdlulwa* above n 13.
[18] See *Mpunga v Malaba* 1959 (1) SA 853 (W) at 861 F; *Dlamini and Another v Mavi and Others* 1982 (2) SA 490 (W) at 492-3; Van der Merwe, *Sakereg*, (2 ed) 125.
[19] *Agha v Sukan* [2004] 3 All SA 421 D at 432.
[20] Above n 18 (p125-6), where the following is stated:

> " 'n Laaste voortel is om die bedoeling om alle ander persone daarvan uit te sluit. Hierdie voorstel hou in dat 'n verteenwoordiger of dienaar geregtig sal wees op 'n mandament van spolie vis-à-vis 'n buitestaander maar nie teen sy prinsipaal of heer respektiewelik nie. Hoewel hierdie standpunt tot billike resultate aanleiding gee, geniet dit geen steun in die regspraak

". . . if the possession of the respondent in this case does not qualify for a spoliation order, who will ever qualify as an applicant in spoliation proceedings in respect of assets of a deceased immediately after his death and before an executor is appointed? On the argument of the applicant, and on the judgment in Mdlulwa, apparently no one. This will leave the assets in the estate unprotected and open to self-help without recourse to a court by anyone for a spoliation order. This result defeats the very object of *a mandament van spolie*; namely to protect society from people taking the law into their own hands.

How, then, should the requirement of holding '*for own benefit*' be interpreted? It may be said with some force that a prospective heir taking care of the deceased's property until an executor is appointed is holding the property 'for his own benefit' in the sense that he has a spes to inheritance to be protected. But what of holders who are not heirs? In *casu*, the benefit in the very narrow sense to respondent may be said to protect the stock in trade . . . but even if I am wrong in this finding, it is my respectful view that the requirement of 'intention to hold for own benefit' should be given a wider meaning to include an interest in the thing held, over and above the interest of a mere *detentor*. I have already indicated that there is support for this view in the case law and jurisprudence of South Africa. Any person holding property in terms of the above mentioned sections of the Administration of Estates Act will, on such meaning, qualify as possessors to claim spoliation. On the narrow meaning, such property may be open to self-help without remedy."

[25] I am of the view that in this case, too, holding "*for own benefit*" should be given a wider meaning. This is especially so where, as in *Agha*[21], the applicant had an interest in the items. She kept the items under strict instructions not to allow others to use same. The property would be liable to self-help if she were to distance herself therefrom purely by reason that she may not be the heir. In any event, she utilised the speakers for social entertainment. The fact that she did not have the authority to use the speakers (and the motor vehicle) did not, in my view, detract from such possession.

[26] I, therefore, conclude that the applicant was in possession of the items when the fourth respondent and the police dispossessed her of same. The possession was of the kind warranting protection accorded by the *mandament van spolie*.

---

nie. In gevalle van indirekte of middellike besit mag die vraag in die toekoms ontstaan of die direkte sowel as die indirekte besitter op die mandament van spolie geregtig is. Indien fisieke beheer namens 'n heer of werkgewer deur 'n dienaar of werknemer uitgeoefen word, huldig ons howe die standpunt dat slegs die heer of die werkgewer die mandament kan instel. Indien 'n direkte besitter soos 'n agent of huurder egter inderdaad die besitswil het omm voordeel uit die saak te trek, word ter oorweging gegee dat die agent of huurder, sowel as die prinsipaal of verhuurder, geregtig behhort te wees om die mandament van spolie in te stel. Aangesien besit nie meer so uitsluitend as in die Romeinse reg is nie, kaan hierdie personne as mede-besitters vir doeleindes van die instelling van die mandament van spolie beskou word. Die direkte besitter behoort die eerste geleentheid te he om die mandament van spolie in te stel. Indien hy egter ongenee of nie in staat is om die mandament in te stel nie, behoort die middellike besitter (naamlik die prinsipaal of die verhuurder in die bogenoemde voorbeeld), geregtig te wees om van die spoediger mandament begruik te maak eerde as wat hy verplig word om die langsamer eiendomsaksie (die rei vindication) te gebruik."

[21] *Agha* above n 19.

Was the dispossession lawful?

[27] Acting in terms of section 18(3) of the Administration of Estate Act 66 of 1965 (the Act),[22] the Master authorised the fourth respondent to take control of the assets of the estate of the deceased,[23] and, after paying debts, transfer the residue of the estate to the heirs entitled thereto by law.

[28] According to the fourth respondent, "[t]*he motor vehicle and the speakers were seized by the police after all attempts to approach the matter in a proper way . . . failed and the police assisted me to get the car through using the letter of authority from the Master of the High Court and therefore I submit that I never took the motor vehicle unlawfully and unconstitutionally . . .* "

[29] Statutory measures have to be interpreted in such a way that they interfere as little as possible with the principle that no person may take the law into his or her own hands.[24] In *Minister of Finance and Others v Ramos*[25] it was held:

> ". . . it should also be borne in mind that where a party opposing an application for a *mandament van spolie* relies upon a statutory provision in order to support an averment that he was entitled thereby to deprive the applicant of his possession, without recourse to due process of law, and that such deprivation or possession was therefore lawful, such statutory provision must be restrictively interpreted. A person who invokes the protection of such statutory provision will need to establish that he acted strictly within its terms.

[30] It becomes necessary, as part of the enquiry, to also consider whether the impugned actions fell within the ambit of the letters of authority, which accorded the fourth respondent the power to "*take control of the assets of the estate of the* [deceased]."

---

[22] The section provides:

> "The Master may dispense with the appointment of an executor and give direction as to the manner in which any such estate shall be liquidated and distributed."

[23] Unclaimed monies totalling R125 755.47, the motor vehicle and the speakers.

[24] *African Billboard Advertising Pty Ltd v North & South Central Local Councils, Durban* 2004 (3) SA 223 (N).

[25] *Minister of Finance and Others v Ramos* 1998 (4) SA 1096 (C) at 1101 G - H.

[31] The terminological problem besetting us may be resolved by having regard to the meaning of "*seize*" and "*take control*". To "*seize*" means to "*take hold of suddenly and **forcibly***." On the other hand, "*to take control*", means to "*gain, assume, or exercise the ability or authority to manage something*."[26] Clearly, these terms mean different things. The element of force is absent when one takes control of something.

[32] Upon a proper interpretation of section 18(3) of the Act, the Master is accorded the power to authorise, in circumstances such as the present one, his representative to take control of the assets of the estate of the deceased. In my view, that power does not include the power to seize. The Master may not grant the representative more powers than he (the Master) has.[27] The manifest purpose of the section is to streamline the administration process by providing an expedient procedure for estates that are of a nominal value. The appointee is not an executor, but the Master's representative with the limited powers specified in the letters of authority.[28]

[33] Therefore, neither the police nor the fourth respondent was entitled to seize the motor vehicle and the speakers. In acting as they did, they resorted to self- help. The fact that the fourth respondent called in the aid of the police was also not sufficient to justify the seizure of the items. Little wonder that the police remained supine, and did not enter the fray of the skirmish.

[34] The irresistible inference to be drawn from the circumstances of this case is that the aid of the police was solicited so as to forcibly remove the items, and to avert any possible form of resistance that the applicant might mete out.

---

[26] Oxford Dictionary.
[27] *Die Meester v Protea Assuransie Maatskappy Bpk* 1981 (4) SA 685 (T) at 690, where it was held "*die Meester as 'n skepping van die wetgewer en het slegs die bevoegdhede wat deur die wetgewer aan hom opgedra is (the Master is a creature of the legislature and has only the power conferred on him by the legislature)*".
[28] Ian Mac Larren, Trusts/Wills and Estates.

[35] Observation needs to be made concerning the fourth respondent and the manner in which she acted. The letters of authority authorised her to take control of the assets of the deceased and to transfer the residue of the estate to heirs. She laboured under the mistaken but ill-begotten view that, even amidst protest, she was entitled to dispossess the applicant of the items. In so doing, she took the law into her own hands. It is a matter of concern that when she acted as she did she had already engaged the services of her attorneys of record, who ought to have known better and dissuaded her from resorting to self-help.

[36] Peace in a community could not be maintained if every person who asserted that he or she had a claim to a particular thing was entitled to resort to self-help to gain possession of a thing.[29] In *Ngqukumba v Minister of Safety and Security*,[30] Madlanga J remarked that "[s]*elf help is so repugnant to our 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.*"

[37] The ineluctable conclusion to which I come is that the seizure of the items was unlawful. Except for reliance on the letters of authority issued in terms of section 18(3) of the Act, which has been proven to be unavailing, no other lawful dispensation was pointed to justifying the seizure.

Declaratory relief

[29] *Municipality of George v Vena* 1989 (2) SA 263; [1989] 2 All SA 125 (A). Also see *Greyling v Estate Pretorius* [1947] 3 All SA 489 (W) at 517, where Price J said:

> "If it became an established practice for the Court to fail to enforce a spoliation order . . . we should very soon find that the slender paradise our toil has gained for us of an ordered community had been lost and the dreadful '*reign of chaos and old night*' would be upon us. The modern Montagues and Capulets . . . would soon make our streets and thoroughfares hideous with their disputes, their fighting and their brawls – turbulence and civil commotion would soon replace law of order and decency."

[30] *Ngqukumba v Minister of Safety and Security and Others* ZACC 14; 2014 (7) BCLR (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) at paras 10 - 13; also see *Monteiro and Another v Diedricks* [2021] ZASCA 015 (SCA), where Goosen AJA (for the majority) held that "*the principle underlying the remedy is that the entitlement to possession must be resolved by the court, and not by a resort to self-help*."

[38] In terms of section 10 of the Constitution everyone has inherent dignity and the right to have their dignity respected and protected. Section 14(a) - (c) of the Constitution accords everyone the right to privacy, which includes the right not to have their home and property searched, and their possessions seized. In terms of section 25(1) no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

[39] On the day in question, the fourth respondent and his cohorts stormed the applicant's premises, conducted a warrantless search therein and, amidst protest, forcibly removed the items from the premises. There is no doubt that such conduct constituted a breach of the applicant's constitutional rights to dignity, privacy and property. It might be that with *Ngqukumba*[31] having clarified the legal position in relation to the nature and ambit of the *mandament van spolie*, the quest for an order declaring unconstitutional the very conduct that has resulted in the grant of a spoliation order will be found to be superfluous. That is a matter for another day.

Conclusion

[40] It follows that the seizure of the items is liable to be declared unconstitutional and that the applicant is entitled to restoration of possession of the items.

[41] Let me, at the same time, caution that, nothing in this judgment should be construed as suggesting that the fourth respondent is precluded from resorting to court and seek an order that the applicant be directed to return the items to her, in the event of her demand for the applicant to surrender the items not being given heed to. The law prescribes that the spoliated thing be returned *ante omnia* or '*at once*,' hence the thing is to be returned to the applicant regardless

[31] Id.

of the fact that she may immediately thereafter be dispossessed of same with the invocation of the due process of law.[32]

[42] It can only be hoped that lucidity will prevail, with the result that the applicant will see her was clear to eventually surrendering the items to the fourth respondent, at the opportune stage, so as to afford the fourth respondent considerable latitude to give effect to the letters of authority, thus avoiding another bout of unnecessary costly litigation over items of nominal value to the detriment of the heirs. The items are part of the deceased estate and will devolve upon heirs after payments of debts, the existence of which have yet to be established.

Costs

[43] The award of costs is entirely a matter for the discretion of the court which is to be exercised judicially upon a consideration of the facts of each case and, in essence, is a matter of fairness to both sides.[33]

[44] This litigation concerns a deceased estate. The general rule that costs follow the event is qualified in litigation concerning deceased estates.[34] Ordinarily, such costs may be ordered to come out of the estate.[35] However, it is as important that the Court ascertains the capacity in which persons representing a deceased estate litigate before orders mulcting such estates in

[32] See *Dyani v Minister of Safety and Security and Others* 2001 (1) SACR 634 (Tk); also see *Sigwebendlana v Minister of Police* (unreported decision of the then Supreme Court of Transkei, delivered on 10 March 1994 under Case No 27/1994), where, in relation to the return of a motor vehicle that had been unlawfully seized without a warrant, Davies AJ said:

> "If an article has been illegally seized and is now being produced or has infact been produced as an exhibit and the owner wishes to get it back, there is no reason at all why the police should not legally seize the article if they have justification for doing so. They would normally be able to do so by obtaining a warrant authorising the seizure if there are proper grounds for such a warrant and in this way **the police could *pari passu* with the handing back of the article, again under warrant, seize the article so that it can remain an exhibit**.". (Emphasis added)

[33] *Wanders Club v Boyes – Moffat* [2011] JOL 27764 (GSJ); 2012 (3) SA 641 (GSJ).

[34] This does not mean that the general rule that success carries costs is not applicable in litigation relating to deceased estates (*Ex parte Ortlepp and Another* [1966] 2 All SA 140 (N); 1966 (1) SA 809 (N) 813).

[35] *Bonsma v Meaker NO and Others* [1973] 4 All SA 269 (R); 1973 (4) SA 526 (R) 531; *Dempers v The Master* (2) 1977 (4) SA 63 (SWA).

costs are made.[36] Where there was litigation involving executors but the court found that the estate was merely a contest between two beneficiaries, it refused to order that costs come out of the estate.[37]

[45] We are here dealing with a scramble for possession of items belonging to a deceased estate by the litigants concerned in their personal capacities. Both parties ought to have known that the items in this dispute formed part of the estate of the deceased, but they allowed their personal contest to cloud their judgment, resulting in an application that could and should have been avoided.

[46] In these circumstances, the estate of the deceased ought not to be mulcted in costs.[38]

[47] The applicant has attained victory in these proceedings. Generally speaking, a successful party should be allowed his or her costs, but this is not a hard and fast rule: each case must be decided on its own facts.[39]

[48] The general rule that costs follow the results is departed from, *inter alia*, where the successful party has acted in bad faith or is guilty of reprehensible conduct. In such instances, the successful party may be ordered to pay the costs of his opponent,[40] or deprived of the whole or part of his costs.[41] The Court

---

[36] Cilliers, Law of costs, 10.10 (10-16 (4 C) (10-12/12) (Issue 41).
[37] *Schoevers v Schoevers* 1965 (3) SA 655 (G) 661 at 665; Compare *Zalk v Inglestone* 1961 (2) 788 (W) at 794.
[38] See *Laubscher NO v Duplan and Another* (*Commission for Gender Equality as amicus curiae*) 2017 (4) BCLR 415 (CC); 2017 (2) SA 264 (CC) at para 56 where, in relation to costs, it was held:

> "The applicant contendend that the costs should be costs in the deceased estate. The respondent submitted that the ordinary rules relating to costs should apply. I am of the view that for costs to come from the deceased estate would be unfairly punitive towards the successful party. Both parties made cogent submissions and the losing party's argument had substance- which warranted the applicant's persistence through to this Court. Accordingly, the interests of justice dictate that each party should bear their own costs."

[39] *Transvaal and Orange Free State Chamber of Mines v General Electric Co.* [1967] 1 All SA 95 (T) ;1967 (2) SA 32 (T) 72 (appeal).
[40] *Merrington v Davidson* (1905) 22 SC 148; *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (T) 371 H.
[41] *King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd* 1984 (4) SA 1240 (D).

may also be fortified in its conclusion on costs by the nature of the conduct of the losing (as opposed to the successful) party.[42]

[49] The manner in which the applicant conducted this litigation is cause for concern. Besides indicating that the matter was possible to settle and that she needed "*documents*"[43] to consider her stance, the papers are bereft of any *bona fide* steps taken to bring that wish to fruition. The fourth respondent has this to say in her answering affidavit:

> "My attorneys of record wrote a letter requesting the release of the motor vehicle and it was served by the sheriff Qumbu and the applicant promised to meet with family members and discuss the matter, my attorneys waited for the response but after the five-day period, a call from Mr *Malala* … enquiring about what was happening in the matter received and it was explained to him and he promised to reply to the aforesaid letter. Me and attorneys of record visited the Master of the High Court to amend the inventory which was not having my husband's assets. I receipted the amended letter of authority dated 18 February 2021 as I was advised by Qumbu police officials that if the items were listed they can be in a position to accompany me to fetch all that belongs to my husband as I was the surviving spouse in the estate of my late husband not the applicant. My attorneys of record contacted me on the 24 February 2021 advising me that a letter from [the applicant's] attorneys [of record] was received promising to consult with the applicant and other family members and the date of the meeting was the 25th of February 2021 and my attorneys wrote another letter to the Master of the High Court and [the applicant's] attorneys requesting for Master of the High Court's intervention and directions as the applicant and her attorneys were delaying this matter unnecessarily. After not receiving feedback for the meeting of the applicant's attorneys from my attorney of record, I **lost patience** and decided to visit the police officials of Tina Falls, Qumbu with the letter of authority having the list of the goods that belongs to my husband and the car and speakers were part of the property. The motor vehicle and speakers were seized . . ."[44] (Emphasis added)

[50] These averments have not been gainsaid by the applicant in reply, and on the *Plascon Evans* rule,[45] they stand unchallenged. The litigation, which could and should have been avoided, at least by the applicant taking reasonable steps to ensure that meaningful settlement talks are held, was instead embarked upon, without ado. Nothing, in the founding papers, is said concerning whether the

[42] *Qaqa v Minister of Correctional Services and Another* [2018] JOL 39784 (GP) at para 32.
[43] No specificity regarding the nature of these documents and what bearing they would have had in her deciding on the matter was given.
[44] Sic.
[45] *Plascon Evens Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635 C.

documents that had been sought eventually came to hand, or why litigation, as against settlement talks, even after the impugned seizure had been effected, was embarked upon. This conduct is reprehensible.

[51] The conduct of the applicant is not so reprehensible as to warrant ordering her to pay the costs of the fourth respondent. Nor should the applicant, in my view, be deprived of her costs altogether on the basis that she did not take *bona fide* steps to settle the matter.

[52] The fourth respondent is also to blame. She did not only lose patience when the applicant's attorneys were not coming to the party after they had proposed settlement, but ended up taking the law into her own hands aided by the police, yet, as already pointed out above, she had demandend the release of the items on pain of "*moving an application to the high court*."

[53] In all these circumstances, and regard being had to the fact that the matter was heard in the ordinary (and not the opposed) motion court,[46] costs should be on the unopposed scale and ought not cover the drawing of the parties' heads of argument filed after the hearing.

Order

[54] I therefore make the following order:

1. *The seizure of the motor vehicle namely, a Toyota Corolla bearing register number BJ[…] and registration letters and number PKG […] (the motor vehicle) and two supersonic speakers (the speakers) at the instance of the fourth respondent is declared unconsitutional.*

2. *The fourth respondent is directed to forthwith restore possession of the motor vehicle and the speakers to the applicant.*

[46] But for the censure, the applicant would, inspite of the hearing having been in the unopposed motion court, have been entitled to costs on the opposed scale.

3. *The fourth respondent shall pay costs of this application incurred up to 16 March 2021 on the unopposed High Court scale.*

_____

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

Applicant's attorney	:	*L Malala* Mvuzo Notyesi Inc 14 Durham Street Mthatha
Respondent's attorney	:	*P N Zide* P N Zide & Partners Inc. 28 Madeira Street Clublink Building Mthatha
Date urgent application heard	:	16 March 2021
Date judgment delivered	:	13 April 2021.