REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No.: 2023/042442
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
24/10/23

In the matter between:

SIBONGISENI MOKHINE MAXWELL MAGWAZA	**First Applicant**
NTHOMBENHLE CYNTHIA NGWENYA	**Second Applicant**
and	
CITY OF EKURHULENI METROPOLITAN MUNICIPALITY	**First Respondent**
EKURHULENI METROPOLITAN POLICE DEPARTMENT	**Second Respondent**
KEAMOGETSE LOVEDENIA MAGWAZA	**Third Respondent**

JUDGMENT

Vally J

[1] On 4 April 2023 the second applicant was driving home in a motor vehicle – a BMW 320i bearing the registration number […]- when she was stopped by officers employed by the second respondent. They asked her to

produce her driver's licence, while at the same time inspecting the vehicle for compliance with the road traffic laws. She did not have her driver's licence with her. She called her husband, the first applicant, to bring it to her, which he did. For reasons that are spelt out below, the two applicants were arrested and charged for alleged criminal conduct, the first for defeating the ends of justice and the second for fraud. The vehicle was taken to the police station for safekeeping. It was then moved to the police pound, to be released to any person who was able to produce a driver's licence or identity document, proof of ownership, a 'certificate of the vehicle', a renewed licence disk and payment of the storage fees. The vehicle is registered in the name of the first applicant's late brother who was married to the third respondent. Nine days later, on 13 April 2023, the vehicle was handed to the third respondent. She was able to produce a letter appointing her as Executor of her late husband's Estate, a valid licence disk, her own identity document and pay the necessary storage fees.

[2] Having lost possession of the vehicle, the applicants seek restoration therof. They claim the dispossession was unlawful. The first and second respondents claim the dispossession was lawful. The third respondent too maintains that the dispossession was lawful, although strictly speaking she can say nothing meaningful on this issue as she was not involved in the dispossession.

[3] The third respondent is cited in her personal capacity as opposed to her official capacity. This, according to the respondents constitutes a fatal non-

joinder. They say that it is the Estate of her late husband that has a material and substantial interest in the relief that is sought. Citing her in her capacity as Executor would have ensured that the Estate was called upon to defend its interest.

Non-joinder or misjoinder

[4] Had the third respondent not been joined to the application the respondents may have had a point that the application is defective for failure to include a party that has a material and substantial interest in the relief sought. But she has been cited, and as a result has been given every opportunity to oppose the relief sought, which she has done. She has filed an answering affidavit to this end. She claims that the vehicle belongs to the Estate of her late husband and has lawfully been returned to her by the employees of the first and second respondent. Thus, even though she was not cited in her official capacity, she clearly participated in the proceedings in that capacity. The failure to cite her in her official capacity is therefore of no moment. By insisting that she be cited in her official capacity, and by asking this court to uphold their point, the respondents are asking for the elevation of form over substance. To do so would, I hold, defeat the interests of justice. The outcome would simply be a postponement of the matter, in order to allow the applicants to cite her in her official capacity. The same papers would be filed, with one minor change, that of her citation. The exercise would simply be a waste of time and money.

Merits

[5] I now turn to the merits. There can be no dispute that prior to being stopped by the two officers, the second applicant had peaceful and undisturbed possession of the vehicle. The third respondent though denies this. Her denial is bare and inconsistent with the facts. By her version, as well as that of the first and second respondents, the vehicle was taken from the second respondent and eventually handed over to her. Her denial is quite frankly inexplicable.

[6] There is a dispute of fact as what occurred during the dispossession.

[6.1] The applicants' case is that the first applicant, upon arrival at the scene, informed the officers of how he came to possess the vehicle and why a valid licence disk was not displayed. The disk that was displayed was not fraudulent, but expired. He recognised one of the officers, a Mr Maseko, who is related to the third respondent. Despite the explanation by the first applicant, both applicants were arrested and charged, the first applicant for defeating the ends of justice and the second applicant for fraud.

[6.2] The first and second respondents claim that two officers, one of which is Mr Maseko, had stopped the second applicant who was driving the vehicle on a national road. The two officers found that the licence disk was expired. This they discovered by radioing the details of the vehicle as indicated on the disk to a colleague who checked the details on the National Registration System (Natis system). They were

informed that, according to the record on the Natis system, the licence had expired. The disk on the other hand indicated that the licence was valid until late in 2023. On these two facts they concluded that the disk was fraudulent. Soon after, the first applicant arrived, got into the vehicle, locked himself therein, tore up the licence disk and swallowed it. Having done so he opened the vehicle and alighted. He and the second applicant were immediately arrested and driven to a police station, charged and placed in custody.

[7] Both parties are in agreement that the licence had expired. They do however disagree on an issue that is fundamental to the determination of the case, viz. on the day of the dispossession did the disk reveal that the licence was expired? According to the first and second respondents the disk did not show this. The disk, according to them, indicated that the licence was valid. The knowledge that it had expired was acquired by dint of the information received from a colleague after they had radioed in the details of the vehicle. According to the applicants the information on the disk did indicate that the licence was expired, i.e. not valid. The first applicant says that he tried to explain to the officers that the licence was expired because he had been unable to secure the co-operation of the third respondent in having the licence renewed. Unfortunately, neither party is able to present the disk or a copy thereof to court. The applicants say nothing of the whereabouts of the disk, while the first and second respondents say that the first applicant ate it. There are two pieces of uncontested factual evidence that should be considered to determine which version, on the probabilities, is correct.

[8] Firstly, the second applicant was arrested and criminally charged. The underlying facts for the charge lay in the information that was reflected on the disk. If the information merely reflected that the licence was expired, then there would be no basis to charge her. Driving a vehicle with an expired disk displayed on the windscreen does not expose the driver to a charge of fraud or any other criminal offence. All the officers could do was issue her with a fine. The charging of the second applicant therefore enhances the plausibility of the first and second respondent's version that the disk was fraudulently obtained.

[9] The second factual evidence actually settles the matter. The third respondent has filed an affidavit, to which the applicants did not reply. She avers that on 6 February 2023 she saw the first applicant at the New Market Mall in Alberton where they had an altercation. The first respondent was in possession of the vehicle. During the altercation she was able to take a photograph of the disk. The information on the disk indicated that the licence would only expire on 30 October 2023. She annexed a copy of the photograph. As the applicants have not challenged this averment, it has to be accepted.

[10] Accordingly, the probabilities are that the version of the first and second respondents is correct, i.e. at the time of the dispossession the disk incorrectly reflected that the licence was valid. Once they discovered that the information on the Natis system indicated otherwise, they were then required in terms of s

3I(o) of the National Road Traffic Act 93 of 1996 (Act) to examine the engine and chassis numbers on the vehicle, compare them to the engine and chassis numbers reflected on the disk, and see if they corresponded. However, before they could do so the first applicant destroyed the disk. Had they done so and found that the numbers did not correspond, they were required to take the vehicle forthwith to any police station for police clearance. After such clearance was obtained they had to return it to the lawful owner. Since they were unable to compare the engine and chassis numbers on the vehicle with that on the disk they were entitled to dispossess the second applicant of the vehicle. The dispossession was, I hold, lawful.

[11] The first and second respondents claim that the vehicle was taken from the second applicant because it was 'not roadworthy'. However, they were unable to provide any details. Apart from the *ipse dixit* – unsupported assertion - of the deponent to the founding affidavit, who incidentally is not one of the two officers who dispossessed the second applicant, there is no evidence to suggest that the vehicle was indeed not roadworthy. I therefore find that the two officers were not entitled to dispossess the second applicant of the vehicle on the ground that it was not roadworthy.

[12] The third respondent's version as to what occurred prior to the dispossession is telling, say the applicants, and supports their case that the dispossession was unlawful. The third respondent says that she is related to Mr Maseko. She had asked him to check if the vehicle was on the road as she had received notification that she was liable for fines that were issued

on/against the vehicle. She also told him that she had not renewed the vehicle licence. On 6 April 2023 she received a call from Mr Maseko informing her that the vehicle had been impounded and taken 'to the police Department.' She was able to retrieve it from the pound. By this version it is clear that Mr Maseko was aware well before the dispossession that the third respondent claimed ownership of the vehicle and that she sought its return. Therefore, at the time he and his colleague stopped the second applicant he had knowledge that the licence was not renewed, at least not by the third respondent. The applicants ask that on these facts an inference be drawn that Mr Maseko abused his employment with the second respondent to settle a civil dispute between the first applicant and the third respondent. Whether this is so or not is irrelevant, as the dispute concerns the lawfulness of the dispossession only. The first and second respondents have been able to show this by demonstrating that the disk displayed on the windscreen incorrectly reflected that the licence was valid. Once this was established, Mr Maseko and his fellow officer were entitled in terms of s 3I(o) of the Act to impound the vehicle. The impoundment in my view constitutes the dispossession. However, even if I were to hold that the dispossession took place only when the first and second respondents refused to return it, the dispossession would still be lawful as it is authorised by s 3I(o) of the Act. Section 3I(o) requires the second respondent to give the vehicle to the owner of the vehicle. In this case the owner is the Estate, and the third respondent as Executor thereof is entitled to receive it on behalf of the Estate.

[13] For these reasons, the application has to fail.

Costs

[14] Costs should follow the result.

Order

[15] The following order is made:

a. The application is dismissed.

b. The applicants are to jointly and severally pay the costs of the application, the one paying the other is to be absolved.

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Vally J
Gauteng High Court, Johannesburg

Date of hearing:	11 October 2023
Date of judgment:	24 October 2023
For the applicant:	S Shamase (Attorney)
For the respondents:	Sinethemba Vobi
Instructed by:	M Mabunda Inc (for first and second respondent) and Seneke Attorneys (for the third respondent)