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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number 4404/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

**MEC: DEPARTMENT OF POLICE, ROADS
& TRANSPORT FREE STATE PROVINCE**

Applicant

and

MAGISTRATE VILJOEN

1ST Respondent

ADRIAAN VERNON BOTHA

2ND Respondent

LAWRENCE OWEN BUTHELEZI

3RD Respondent

CORAM: CHESIWE, J et VAN RHYN, J

HEARD ON: 15 AUGUST 2022

DELIVERED ON: 19 AUGUST 2022

JUDGEMENT BY: VAN RHYN J

[1] This is an application by the Member of the Executive Council for the Department of Police, Roads & Transport in the Free State Province (the “applicant”) for the review of an order granted on 28 May 2021 by the first respondent, Magistrate Viljoen of the Kroonstad Magistrates’ Court.

[2] First respondent filed a notice to abide by the court’s decision.

[3] The matter is opposed by Mr. Adriaan Vernon Botha (the “second respondent”), a major male residing at K[....]. It is common cause that the second respondent is the registered owner of a Toyota Conquest motor vehicle with registration number [....] (the “Toyota”), which was seized and impounded by traffic officials employed by the applicant.

[4] The third respondent is Mr. Lawrence Owen Buthelezi, a major male resident of Kroonstad. The third respondent is not opposing the review application.

[5] The applicant seeks an order in following terms:

(1) That the order granted by the first respondent on 28 May 2021 and in terms whereof the first respondent ordered that the motor vehicle with registration number [....] be unconditionally handed over to the second respondent in terms of section 99(2)(b) of the Free State Public Transport Act, Act 4 of 2005 (the “Act”), be reviewed and set aside; and

(2) The order of the first respondent be replaced with the following order:

“It is ordered that the motor vehicle with registration number [....] be returned to the third respondent, on payment to the relevant head of the depot, of the amount determined by the MEC of the Free State Provincial Department, Police, Roads & Transport.

[6] The salient facts are as follows:

On 5 February 2021, the third respondent (the then owner of the Toyota) was issued with a notice in terms of the provisions of section 56 of the Criminal Procedure Act¹ (the “CPA”) to appear in the Magistrates’ Court, Kroonstad. The notice called upon the third respondent to appear at court on 28 April 2021 on a charge of conveying passengers for reward without the necessary permit in contravention of section 102(1)(a) read with section 4(3)(a) of the Act.

[7] Simultaneously with the issuing of the notice, the traffic officer seized and impounded the Toyota with which it is alleged that the third respondent conveyed persons for reward without having the necessary permit. As a norm the notice embodied an option to the third respondent to pay an admission of guilt fine in the amount of R1 500,00 in lieu of an appearance before court. Third respondent elected not to pay the admission of guilt fine.

[8] On 12 March 2021 and at the Kroonstad Magistrates’ Court the first respondent convicted the third respondent of the offence. The first respondent imposed a sentence of six (6) months imprisonment with an option of a fine in the amount of R3000.00, which sentence was wholly suspended for a period of five (5) years on condition that the third respondent shall not be convicted of contravention of Section 102(1)(a) of the Act during the period of suspension.

[9] The first respondent adjudicated upon an application for the return of the Toyota brought by the second respondent on 28 May 2021. The transcription of the record of proceedings before the first respondent in case number PVC 103/2021 in the matter between The State and Owen Buthelezi, was filed by the applicant. From the contents of the founding and answering affidavits, as well as the record of proceedings, the following facts appear:

¹ Act 51 of 1977.

9.1 During December 2020 the second and third respondents entered into an oral agreement in terms whereof the second respondent purchased the Toyota from the third respondent in the amount of R 25 000.00

9.2 The parties agreed that R20 000.00 was payable on or before 31 December 2020, and the balance, in the amount of R 5000.00, to be paid to the third respondent on or before 7 February 2021. The third respondent would retain possession of the Toyota until final payment of the purchase price. The amount of R5 000.00 was paid to the third respondent on 5 February 2021.

9.3 However, before the Toyota could be delivered to the second respondent, the third respondent was issued with the aforesaid notice by the traffic officer and the Toyota was impounded.

9.4 On 5 May 2021 the second respondent, with the co-operation of the third respondent, saw to the registration of the Toyota in the name of the second respondent. A copy of the certificate of registration of the Toyota is appended to the review application.

9.5 On 25 May 2021 the third respondent was granted leave to appeal against the conviction and sentence handed down by the first respondent.

9.6 On 28 May 2021 second respondent, through his attorney, applied for an order in terms of the provisions of section 99(2)(b) of the Act for an order that the Toyota to be returned to the registered owner, the second respondent.

9.7 The first respondent noted as follows on the record of the criminal proceedings: "Accused confirmed that the motor vehicle concerned was sold to Adriaan Botha before it was confiscated".

9.8 The National Prosecuting Authority did not oppose application for the vehicle to be handed to the second respondent.

9.9 The second respondent, with the assistance of his attorney, made several attempts to obtain possession of the Toyota subsequent to the first respondent granting the court order. The Chief of the Department of Police, Roads and Transport at the Kroonstad Traffic Office refused to hand over the vehicle to the second respondent as per the court order.

9.10 The second respondent has suffered damages and is being prejudiced due to the Toyota being vandalised at the depot.

[10] Mr Mazibuko, counsel on behalf of the applicant, submissions are that:

10.1 Firstly, the first respondent had no jurisdiction to make the order and thus exceeded his powers; and

10.2 secondly, in making the order, the first respondent had committed a material error of law amounting to a gross irregularity.

[11] The applicant argued that the determination of this matter depends upon the interpretation of section 99(2) of the Act which provides as follows:

“99 Impoundment of vehicles

(1) An authorized officer who is satisfied on reasonable grounds that a motor vehicle is being used by any person for the operation of public transport without the necessary operating licence or permit or contrary to the conditions imposed with regard thereto, may impound the vehicle pending the investigation and prosecution of that person for an offence mentioned in section 102(1)(a) or (b).

(2) A vehicle impounded under subsection (1) must be delivered to the head of the depot contemplated in subsection (4), who must retain the vehicle in the depot and released it to the concerned person only-

(a) when the criminal charges against the person have been withdrawn or the person has been acquitted of the offence charged; or

(b) in the case where the person is convicted of the offence charged, and unless the court has ordered otherwise, on payment to the head of the depot of the amount determined by the MEC.” (emphasis added)

[12] In **Cool Ideas 1186 CC v Hubbard and Another**² the Constitutional Court held as follows:

“A fundamental tenet of statutory interpretation is that the words in the statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised:

(c) all statutes must be construed consistently with the Constitution, that is, we are reasonably possible, legislative provisions ought to be interpreted to preserve the constitutional validity. This proviso to the general principle least closely related to the purposive approach referred to in (a).”³

[13] On behalf of the applicant it was argued that on a proper reading and interpretation of section 99(2), the Toyota may only be released to the person from whom it was seized and against whom criminal charges were instituted. The “concerned person” can therefore only be the person against whom criminal charges or prosecution had been initiated, namely the driver of the relevant motor vehicle.

[14] Mr Janse van Rensburg, counsel on behalf of the first respondent, raised the following points:

² 2014 (4) SA 474 (CC).

³ Cool Ideas *supra* at [28]

13.1 the applicant does not have the necessary *locus standi* to bring the application;

13.2 the National Prosecuting Authority, should have been joined in the review application.

[15] The second respondent contends that the applicant in this review application was not a party to the criminal proceedings held before the first respondent and is therefore at best an interested party on the basis that the applicant is currently in possession of the Toyota. In view of the applicant's lack of *locus standi* through its indirect interest it is contended that the review application should be dismissed with a punitive cost order.

[16] Regarding the non-joinder of the National Prosecuting Authority, who has a direct interest in the outcome of this review application, the failure to join the National Prosecuting Authority is fatal for the applicant's case.

[17] In respect of the preliminary issues of *locus standi* and non-joinder raised by the second respondent, I am of the view that the applicant, as the custodian of the Toyota seized by the traffic officials, has an obligation to see to the release of the impounded article to the person concerned as provided for in the Act. In terms of the provisions of section 9, Part 3 of the National Land Transport Act⁴, the applicant is clothed with specified functions which include the monitoring of the implementation of the Provincial Land Transport Policy and investigations conducted into matters arising from such implementation and to assist municipalities in meeting their responsibilities and performing their functions and duties with regard to land transport. I am therefore of the view that the applicant does possess the necessary *locus standi* to bring this review application.

[18] Furthermore, even though the Director of National Prosecutions was not cited as a party to this application, the first respondent, as the magistrate who convicted

⁴ Act 5 of 2009.

the accused in the criminal matter against the third respondent and granted the order for the release of the Toyota, has been cited as a party to the review application and filed a notice to abide by the court's decision. The notice to abide was filed by Me C Cawood of the Office of the State Attorney, Bloemfontein. The applicant in this matter is represented by Mr J H Engelbrecht of the same office. The Director of National Prosecutions is therefore represented through the first respondent who has abided by the court's decision.

[19] The issue in this review is primarily one of statutory interpretation. The Act does not define the words "person concerned". The provisions of section 87 of The National Land Transport Act are similar to the provisions of section 99 of the Act with no definition of the concept "person concerned". In the absence of a definition of the concept of "person concerned" in the national and the relevant provincial acts, cognisance has to be taken to the ordinary grammatical meaning of the words "person concerned" to whom the article seized must be returned.

[20] The word "concerned" is defined as an adjective meaning "involved, troubled, anxious, showing concern"⁵ with or by something.

[21] In **Minister van Wet en Orde & 'n Ander v Datnis Motors (Midlands) (Edms) Bpk**⁶ the facts were that the respondent had sold motor vehicles to N and B respectively and while the vehicles were in their possession they were seized by police officials under the provisions of section 20 of the CPA on the grounds that it was suspected that they were stolen vehicles. The Attorney General refused to prosecute, but the vehicles were not returned to N and B. The police assumed that the vehicles had been forfeited to the State on the basis that nobody could legally possess stolen vehicles.

[22] An application by Datnis Motors, to whom N and B had ceded all their rights with regard to the vehicles, directed at obtaining an order for the return of the vehicles followed and was granted. The appellant (the Minister) were granted leave to appeal. The only dispute was whether the Attorney General's refusal to prosecute

⁵ The New Shorter Oxford English Dictionary, Vol I, 1993.

⁶ 1989 (1) SA 926 (AA).

meant that the State, because of the provisions of section 31(1) of the CPA, had to return the vehicles to the person who had possession of them before their seizure.

[23] On appeal Van Heerden JA held that the object seized, in such instance had to be returned to the person from whom it had been seized unless that person's possession of the object would be unlawful. The inadequacies in the wording of section 31(1) of the CPA, namely that it was not apparent who the "concerned police official" referred to in section 31(1)(b) was, who had to decide who may lawfully possess such article, or at what stage it was envisaged by the Legislature that the forfeiture of an object was to take place, was considered and it was held that a reformulation of the subsection was necessary. The application for the return of the two vehicles to N and B was granted due to the State's failure to show that the person from whom the objects were seized could not legally possess it and was therefore not entitled to its return.

[24] The uncertainty regarding the interpretation of the relevant section of the CPA was addressed as follows by Van Heerden JA:

Dat die wetgewer nie kon beoog het dat 'n gesteelde voorwerp ingevolge art 31(1) terugbesorg moet word aan die person van wie dit in beslag geneem is nie, kan aan die hand van die volgende voorbeeld geïllustreer word. A steel 'n fiets van B en verkoop en lewer dit aan C wat onbewus van die diefstal is. Die polisie lê daarop beslag en stel vas dat dit inderdaad B se gesteelde fiets is. Hierdie inligting word aan C oorgedra. Om een of ander rede, bv omdat A inmiddels oorlede is of uit die land gevlug het, word geen vervolging in verband met die fiets ingestel nie. Indien C die fiets wel wettiglik mag besit, moet die polisie dit ingevolge art 31(1) aan hom teruggee, hoewel daar geen twyfel is dat A die fiets van B gesteel het nie. Ek kan my net nie voorstel dat die Wetgewer kon bedoel het dat C onder hierdie omstandighede die fiets moet terrugkry nie. Intendeel moes beoog gewees het dat C nie die fiets wettiglik kan besit nie, en dat dit daarom moet gaan na B wat dit wel dusdanig kan besit."⁷

⁷ Datnis Motors *supra* at p 934 A- D.

[25] Para (b) was subsequently substituted by section 2 of Act No 5 of 1991 to read that if no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.

[26] It is common cause that the second respondent is the lawful owner of the Toyota. Mr Mazibuko argued that on a proper reading of section 99 (1) (b) the impounded Toyota may only be released to the third respondent being the “person concerned”. However, Mr Mazibuko conceded that, in the event of the third respondent having passed away or immigrated to another country, it would therefore not be possible to release the vehicle to anybody, not even the executor of his estate.

[27] To my mind it will be absurd to hold that the lawful owner of the Toyota may not claim the release thereof merely on the basis that the third respondent, who has confirmed that he has no claim to the vehicle, due to the sale of the Toyota to the second respondent, is the person who had been convicted of the offence and is thus the only person to whom the Toyota may be released.

[28] In **Pakule v Minister of Safety and Security and Another; Tafeni v Minister of Safety and Security and another** ⁸ the Supreme Court of Appeal held that a vehicle seized by the police cannot be returned to a person from whom such item has been seized if any of the features referred to in section 68(6) (b) of the National Road Traffic Act⁹ are present. Pakule, a taxi operator in the Eastern Cape employed a driver for his taxi. The driver was not in possession of a driver’s licence and the vehicle had neither number plates nor a licence disc. These factors constitute contraventions of the National Road Traffic Act and accordingly all constituted criminal offences in which the motor vehicle was involved. From the evidence in the Pakule matter it was clear that the return of the motor vehicle from whom it was seized would be an exercise in futility, bearing in mind that at the moment of the return thereof, the motor vehicle might be lawfully seized again. ¹⁰

⁸ [2011] 4 All SA 159 (SCA).

⁹ Act 93 of 1996.

¹⁰ Pakule *supra* at [31] –[32].

[29] Courts should prefer interpretation of legislation that fall within the constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the relevant section.¹¹ The third respondent is not the owner of the Toyota and is evidently not concerned with the release of the vehicle. The relevant section does not explicitly exclude the owner of the impounded motor vehicle to obtain possession thereof and I therefore can see no reason why the owner of the vehicle seized and impounded to be excluded from the notion of a “person concerned”.

[30] Taking cognisance of the principles pertaining to the interpretation of legislation as enunciated in **Cool Ideas**, the court should interpret legislation purposively. There would be no purpose in releasing to Toyota to a person who does not have a legitimate claim to the item and to negate the claim of a person concerned with its release and involved or affected by the seizure thereof.

[31] The first respondent has ordered “otherwise” as provided for in the rider included in subsection (2)(b) of the Act, by granting an order for the release of the Toyota to the second respondent. I am unable to find that the first respondent could not have granted such an order under the prevailing circumstances.

[32] Section 34 of the CPA regulates the disposal of articles, after the commencement of criminal proceedings and provides as follows:

“34(2) The judge or judicial officer presiding at criminal proceedings shall at the conclusion of such proceedings, but subject to the provisions of this act or any other law, under which any matter shall all may be forfeited, make an order that in any article referred to in section 33-

(a) be returned to the person from whom it was seized, if such a person may lawfully possess such article; or

¹¹ Investigation Directorate: Serious Economic Offences and others v Hyundai Motors Distributors (Pty) Ltd and others, In re: Hyundai Motors Distributors (Pty) Ltd v Smit NO and others 2001 (1) SA 545 CC at [23].

(b) If such a person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article;

(c) ...

(d) the court may, for the purpose of any order under said subsection (1), hear such additional evidence, whether by affidavit or orally, as it may deem fit.”

[33] Similarly, and subsequent to the criminal proceedings in the Magistrates’ Court, the first respondent heard additional evidence and made the order which forms the subject of this review. The contention on behalf of the applicant that the Toyota may only be returned to the third respondent, being the only person concerned, is untenable. I am not convinced that the first respondent was not empowered to make such an order. I am furthermore persuaded by all these considerations and a proper reading of the applicable legislation that the Toyota should be released to the second respondent.

[34] In the answering affidavit the second respondent asks for a punitive costs order. The conduct of the applicant in retaining the vehicle long after the first respondent has granted the release of the Toyota to its rightful and lawful owner and taking cognisance of the numerous attempts of the second respondent and his attorney to obtain the release of the Toyota, I am satisfied that a cost order that will not leave the second respondent out of pocket justifies a special costs order.

[35] The review application should fail on the basis that the first respondent did have the necessary jurisdiction to make the order as he did and furthermore there is no material error of law made by the first respondent, nor any gross irregularity.

[36] **It is therefore ordered that:**

1. The review application is dismissed.

2. The applicant is ordered to pay the second respondent's costs on the scale of attorney and client.

VAN RHYN J

I concur and it is so ordered

CHESIWE J

On behalf of the Applicant:

ADV M.S MAZIBUKO

Instructed by:

THE STATE ATTORNEY
BLOEMFONTEIN

On behalf of the Second Respondent:

ADV. G.S.J VAN RENSBURG

Instructed by:

JACOBS FOURIE ATTORNEYS
BLOEMFONTEIN