

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA**

CASE NO: **254/2019**

Date heard: **08 February 2019**

Date delivered: **26 February 2019**

In the matter between:

YANDISA NOMBEWU

Applicant

and

THE MINISTER OF POLICE, RSA

First Respondent

**THE STATION COMMANDER, MADEIRA POLICE
STATION**

Second Respondent

SQ RISK SA

Third Respondent

JUDGMENT

LOWE, J:

INTRODUCTION

[1] Applicant brought an urgent application essentially for the return by First, Second and Third Respondents to Applicant of Toyota Quantum vehicle JDN361EC, with ancillary relief. Costs were sought against all Respondents on the Attorney Client scale.

[2] The matter was opposed, and affidavits filed by all to the stage of a complete set of papers.

[3] First and Second Respondents sought dismissal of the Application with Attorney Client costs, whilst Third Respondent pointed out that there was no need to have joined it in the Application, let alone seeking merits relief against it and a costs order, and in the result and accordingly sought the dismissal of the relief sought against it with Attorney Client costs.

THE RELEVANT FACTS ON THE CORRECT APPROACH

[4] As to the approach to the affidavits – the papers being complete and the relief sought thus being final relief – the following is the position.

[5] Motion proceedings, unless concerned with interim relief – are about the resolution of legal issues based on common case facts. Save in special circumstances, and the facts here do not raise special circumstances, such proceedings cannot resolve factual disputes on issues, as they are not designed to determine probabilities. As set out in the ***Plascon-Evans*** rule if disputes of fact arise on the affidavits a final order can only be granted if the facts, averred by Applicant, which have been admitted by Respondent, together with the facts alleged by Respondents, justify such relief.

[6] The position may be different if Respondents' versions consist of bald or uncreditworthy denials, raises fictitious disputes of fact or are implausible, farfetched or clearly untenable.¹

[7] The question of onus does not arise in motion proceedings and the position above pertains regardless of where the evidential onus lies.²

[8] Finally the more serious the allegation (or its consequence) the stronger must be the evidence before a Court will find the allegations established.³

[9] Applying the above to this matter, the fundamental facts established on the papers are the following:

[9.1] At all times relevant, until seized by First and Second Respondents, motor vehicle Toyota Quantum JDN361EC (the vehicle) was in Applicant's possession and driven by his employee driver Mr L Ntongana.

[9.2] On 17 January 2019 the vehicle was seized by First Respondent and "*impounded*" because its tracking device was in fact one associated with a different vehicle HLL932EC which was reported as a stolen vehicle.

¹ *Thint (Pty) Ltd v National Director of Public Prosecutions & Others* 2008 (2) SACR 421 (CC); *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA) [26].

² *Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A); *Zuma supra* [27].

³ *Zuma supra* [27].

[9.3] The vehicle's engine number belonged to a different vehicle. Vehicle HLL932EC was subject to a police investigation docket CAS91/01/2019.

[9.4] The body of the vehicle belonged to another vehicle and had been "*cut and joined*" (this only discovered on 31 January 2019 and thus irrelevant to the seizure).

[9.5] The vehicle was identified by Third Respondent, an agent of "*Cartrack*", as stolen and was located by Third Respondent which reported this to the police and who (the police) then stopped the vehicle in York Road, Mthatha and told the driver to go to Madeira Police Station where the police examined same and informed the driver that it would be impounded – as a stolen vehicle.

[9.6] The search of the vehicle and its seizure were without consent.

[9.7] The Applicant refused to produce the original papers – this irrelevant to the seizure however.

THE LEGAL POSITION

[10] This is a Spoliation Application. There are two issues, being whether the prerequisites of spoliation have been satisfied on the facts above, and associated with this whether the impounding was unlawful.

[11] A spoliation order is a final order. Spoliation takes place when a person in possession is wrongfully deprived of possession of certain property. There must be the holding of possession by Applicant, with the intention of securing a benefit, and the deprivation thereof by self help (as opposed to a court order), consent or a statutory right to deprive the Applicant of possession. That is peaceable possession and a wrongful deprivation.

[12] The question as to whether the police may retain a vehicle unlawfully seized by virtue of Section 68(6)(b) of the National Road Traffic Act 93 of 1996 (possession without lawful cause of a vehicle whose chassis and engine numbers have been mutilated or falsified) was answered in the negative by the Constitutional Court in the decision ***Ngqukumba v Minister of Safety & Security & Others***⁴, reversing the decision of the SCA.

[13] In summary the said decision sets out that:

[13.1] The Mandament van Spolie is applicable to the return of vehicles by the police if unlawfully seized even if engine and chassis numbers have been tampered with.

⁴ 2014 (5) SA 112 (CC).

[13.2] The aim is the restoration, before all else, of unlawfully deprived possession, as a motor vehicle relevant might be perfectly lawfully possessed even with tampered identification if there is lawful cause for such possession.

[13.3] The lawfulness or otherwise of possession post-dates restoration and would have to be established at a subsequent hearing.

[13.4] In respect of the said vehicle all that is to be considered, at the spoliation stage, is possession and unlawful deprivation.

[13.5] If the above is established, restoration is ordered even to a thief or robber – as it is only after self-help is purged that the lawfulness of possession becomes relevant.

[14] Clearly in this matter there was possession in the sense required and the vehicle must be returned unless it was lawfully seized – in this case subject to the Statutory entitlement to seize.

[15] As set out in ***Magobodi v Minister of Safety and Security and Another***⁵:

“[8] Searches and seizures must, in general, be carried out in terms of legislation which sets out the power to search and seize. The legislation that we are concerned with in this matter is the Criminal Procedure Act 51 of 1977 (the Act), in particular, chapter 2 thereof. Section 20 of the Act provides that the State may, in accordance with the provisions of ch 2, seize any article which is concerned in or on reasonable grounds is believed to be

⁵ 2009 (1) SACR 355 (TkHC) 359

concerned in the commission of an offence, or which may afford evidence of the commission or suspected commission of an offence, or which is intended to be used in or is on reasonable grounds believed to be intended to be used in the commission of an offence.

Section 21 of the Act provides inter alia that an article referred to in s 20 shall, subject to the provisions of ss 22, 24 and 25, be seized only by virtue of a search warrant issued by a magistrate or justice. Section 22 of the Act provides as follows:

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 –

- (a) if the person concerned consents to such search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
- (b) if he on reasonable grounds believes -
 - (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and
 - (ii) that the delay in obtaining such warrant would defeat the object of the search.

Sections 24 and 25 of the Act are not relevant to this matter.

[9] The issue of a search warrant provides, in my view, the best safeguard to regulate search and seizure. The issue of a search warrant involves the prior authorisation by, usually, a magistrate acting in his or her judicial capacity on evidence given on oath which must satisfy him or her that the policeman seeking the warrant has reasonable grounds for suspecting that an offence has been committed. See *SA Association of Personal Injury Lawyers v Heath and Others* 2000 (10) BCLR 1131 (T).

[10] In this matter there is no such safeguard and it is clear from Inspector Matwa's affidavit that no magistrate or justice acting judicially would have issued a search warrant in respect of the vehicle. This is so because when they approached the vehicle neither Inspector Matwa nor Inspector Msizi had any knowledge, nor did they on reasonable grounds believe, that the vehicle was concerned in the commission or suspected commission of an offence, or that it may afford evidence of the commission or suspected commission of an offence, or that it was intended to be used in the commission of an offence. They were merely going down the street from one parked vehicle to another asking for permission to search the vehicle by inspecting the engine. They were, to put it crudely, on a fishing expedition."

[16] In *Mnyungula v Minister of Safety and Security and Others*⁶ the following was said:

"[5] It is common cause that the third respondent, when he seized the vehicle, purportedly did so in terms of ss 20 and 22 of the Criminal Procedure Act 51 of 1977 (the Act).

[6] In terms of s 20 of the Act, the State may seize anything (termed an 'article'), *inter alia*,

'which is concerned in or on reasonable grounds believed to be concerned in the commission or suspected commission of an offence'

or

'which may afford evidence of the commission or suspected commission of an offence'.

[7] Section 21 of the Act, however, requires the seizure to be effected by virtue of a search warrant subject to the provisions of ss 22, 24 and 25 of the Act. Only s 22 is relevant in this matter and that is to the effect that the police official may only seize any article referred to in s 20, without a warrant:

- (a) if the person concerned consents to the search for and seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
- (b) if he on reasonable grounds believes –
 - (i) that a search warrant will be issued to him under para (a) of s 21(1) if he applies for such warrant; and
 - (ii) that the delay in obtaining such warrant would defeat the object of the search'.

[8] Section 20 of the Act was considered in many cases by the courts. In *Ndabeni v Minister of Law and Order and Another* 1984 (3) SA 500 (D) Didcott J stated the following at 511D - E:

'The second respondent [that is the policeman concerned] no doubt thought that there were reasonable grounds for the belief he held. That, however, was by the way. Section 20 of the Criminal Procedure Act calls for the existence in fact of reasonable grounds. And whether these exist in a given case must be determined objectively. Milne J once said:

"There can only be reasonable cause to believe . . . where, considered objectively, there are reasonable grounds for the belief. . . . (I)t cannot be said that an officer has reasonable cause to believe . . . merely because he believes he has reasonable cause to believe."

[9] The quotation referred to is from the judgment by Milne J, as he then was, in *Watson v Commissioner of Customs and F Excise* 1960 (3) SA 212 (N).

[10] In the unreported case of *Sigwebedlana v Minister of Police*, case No 27/94 in this Division, Davies AJ, as he then was, expressed his agreement with the test set out in the *Watson* case *supra*. In the same case he said the following:

'In my view the fact that an article illegally seized is a potential or indeed an actual exhibit does not mean that the owner cannot get it back.'

⁶ 2004 (1) SACR 219 (TkHC) 221

[11] This aspect was also considered in this Division in the unreported case of *Hiya v Minister of Safety and Security and Others*, case No 506/99, a Full Bench decision, wherein the seizure of a vehicle was set aside. In the *Dyani* case the question of whether there was consent to the seizure was referred for the hearing of oral evidence.

[12] In interpreting s 20 and s 22 it is clear that the *onus* is on the police to prove, objectively viewed, the existence of ample facts upon which the police base the reasonable belief, which facts must exist at the time when the police acted without a warrant, and not only at a later stage.

[13] I now turn to the facts of the case before me.

[14] It is common cause that the applicant did not consent to the search and the seizure of the vehicle.”

[17] The question then is whether on the relevant facts referred to above the deprivation was lawful in terms of Section 20 – 22 of the Criminal Procedure Act. Put otherwise in the absence of consent the question is whether reasonable grounds existed for the infringement of the right to privacy – there being a constitutional duty to critically regard search and seizure to ensure it was lawfully sanctioned, reasonable and justifiable.⁷

[18] Whether reasonable grounds as required in Section 22(b) of the Criminal Procedure Act were present is an objective question on all relevant facts before the Court – that is at the time of seizing without warrant.

[19] In ***Mbutuma v The Mec for Safety and Security of the Eastern Province***⁸ Madlanga J (as he then was) held that if a vehicle was seized in terms of

⁷ *Magobodi (supra)* [7].

⁸ 1998 (1) SACR 367 (Tk)

section 22(b) of the Criminal Procedure Act, after an inspection revealed falsified engine and chassis numbers, this was grounds for a reasonable belief that the vehicle was stolen affording evidence of the commission or suspected commission of theft. I agree entirely with this view.

[20] In this matter the vehicle clearly had fitted to it the tracker of a vehicle that had been stolen; it also had engine numbers of a different and stolen vehicle, HLL932EC.

[21] In my view this, viewed objectively, gave cause for a reasonable belief that not only was the vehicle stolen but also afforded evidence of the commission or suspected commission of theft.

[22] In the result and in these circumstances the seizure was a lawful seizure in terms of Section 20 – 22 of the Criminal Procedure Act, and the Application must fail with costs.

[23] I should say that I am in full agreement with Third Respondent that its joinder, on the basis of direct relief and costs being sought against it, was highly inappropriate and puzzling to say the least.

[24] Having regard to the failure of the Application the only issue remaining is the scale of costs. In my view, however, despite the above, there is no basis set

out for attorney and client costs in respect of any of Respondents and such punitive order is not warranted.

ORDER

1. The Application is dismissed.
2. The Applicant is to pay First, Second and Third Respondents' costs.

M.J. LOWE
JUDGE OF THE HIGH COURT

Obo the Applicant: Mr Malingwa

Instructed by: S. S. Nkonyeni Incorporated, Mthatha

Obo the 1st & 2nd Respondents: Mr Ngandela

Instructed by: The State Attorney, Mthatha

Obo the 3rd Respondent: Mr Botma

Instructed by: J.A. Le Roux Attorneys, Mthatha