



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

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

DATE OF HEARING: **15 OCTOBER 2018**
DATE DELIVERED: **26 OCTOBER 2018**

CASE NO: **1084/2013**

In the matter between:

VISAGIE, DANIEL t/a PRIESKA ENTERTAINMENT CENTRE Applicant

and

THE MINISTER OF SAFETY AND SECURITY NO 1st Respondent

**THE PROVINCIAL COMMISSIONER OF THE SAPS,
NORTHERN CAPE NO** 2nd Respondent

**THE CHAIRPERSON: NORTHERN CAPE GAMBLING
AND RACING BOARD NO** 3rd Respondent

WARRANT OFFICER DANIELS NO 4th Respondent

THE STATION COMMANDER, PRIESKA SAPS NO 5th Respondent

AND

CASE NO: **1085/2013**

STEYTLER, CLYDE SHADLEY t/a KURUMAN ENTERTAINMENT CENTRE Appellant

And

THE MINISTER OF SAFETY AND SECURITY NO 1st Respondent

**THE PROVINCIAL COMMISSIONER OF THE SAPS,
NORTHERN CAPE NO**

2nd Respondent

**THE CHAIRPERSON: NORTHERN CAPE GAMBLING AND
RACING BOARD**

3rd Respondent

CAPTAIN LM VOS NO

4th Respondent

THE STATION COMMANDER, KURUMAN NO

5th Respondent

THE MAGISTRATE, KURUMAN NO

6th Respondent

Coram: Tlaletsi JP et Olivier ADJP et Mamosebo J

JUDGMENT

Olivier ADJP:

INTRODUCTION

[1.] During July 2013 members of the South African Police Services, armed with search warrants, searched the premises of Mr D Visagie, who traded as the Prieska Entertainment Centre, and the premises of Mr C S Steytler, trading as Kuruman Entertainment Centre, and seized various items, including certain machines. Both Mr Visagie and Mr Steytler then lodged applications for the setting aside of the warrants and for orders that possession of all the seized items be restored. In both applications the Minister of Safety and Security, the Provincial Commissioner of the South African Police Services in the Northern Cape and the Chairperson of the Northern Cape Gambling and Racing Board were cited as, respectively, the first, second and third respondents. Certain police officials were also cited as respondents, and in the Steytler application the Magistrate, Kuruman, was also cited in his/her official capacity.

- [2.] The applications were opposed by only the first, second and third respondents. Both applications were heard simultaneously and on 6 September 2013 Williams J set aside the warrants, and in both applications ordered the respondents “*to forthwith return and restore possession of the movable goods **which the applicant may lawfully possess** and money that was seized ... during the execution of the search warrant ...*” (My emphasis). As will be seen in what follows the result of the orders regarding the restoration of possession was that restoration of the machines was in effect not ordered.
- [3.] In refusing to order the restoration of the possession of the machines, the court *a quo* applied the judgment in **Ngqukumba v Minister of Safety and Security and Others**¹ (hereinafter referred to as “*the SCA Ngqukumba judgment*”), and held that the machines could not be returned to Steytler and Visagie as they were gambling machines and as possession thereof by Steytler and Visagie would constitute a contravention of the provisions of section 9(1) of the **National Gambling Act**², and would constitute a criminal offence in terms of section 82 of that Act.
- [4.] As will appear from what follows the **SCA Ngqukumba** judgment had overruled that court’s judgment in **Ivanov v North West Gambling Board and Others**³ (hereinafter referred to as “*the Ivanov judgment*”) on the issue of whether possession could be restored to an applicant whose continued possession would be illegal. At the time of the hearing of the applications that are the subject of this appeal the **SCA Ngqukumba** judgment was, however, the subject of an application for leave to appeal to the Constitutional Court, which application had at that stage not yet been decided.
- [5.] The present matter concerns appeals by both Steytler and Visagie against the refusal of the court *a quo* to order the return of the machines. In what follows I

¹ 2013 (2) SACR 381 (SCA)

² 7 of 2004

³ 2012 (2) SACR 408 (SCA) (Also reported at 2012 (6) SA 67 (SCA))

will refer to Steytler and Visagie as “*the appellants*”. The appeal is only opposed by the first and second respondents, who are at this stage represented by Mr Fourie. Mr Jagga appeared as counsel for the appellants.

THE IVANOV JUDGMENT

- [6.] In the **Ivanov** judgment the Supreme Court of Appeal held that the legality of the continued possession of property that had been unlawfully seized by the police (in that case gambling machines) was irrelevant for purposes of spoliation, and of the question whether restoration of possession thereof should be ordered.
- [7.] The restoration of the gambling machines was therefore ordered despite it having been common cause that the particular applicant could not legally possess them.

THE SCA NGQUKUMBA JUDGMENT

- [8.] In the **Ngqukumba** matter the Supreme Court of Appeal basically held that the rule that possession must be restored in the case of spoliation, is not an absolute one. It was held that, where it was clear that continued possession of an object would be illegal, the court would not make an unqualified order that possession of the object be restored.
- [9.] It was furthermore held that the **Ivanov** judgment was wrong insofar as it had come to the contrary conclusion.
- [10.] The Supreme Court of Appeal consequently dismissed an appeal against the refusal of an order restoring possession of a vehicle, on the basis that possession of the vehicle, even pursuant to a court order, would constitute a crime.

CONSTITUTIONAL COURT

[11.] Leave to appeal to the Constitutional Court was eventually granted in the **Ngqukumba** matter and the judgment of that court will in what follows be referred to as “*the CC Ngqukumba judgment*”.

[12.] In paragraphs 15 and 21 of its judgment the Constitutional Court drew a distinction between things that can under no circumstances be possessed legally and those that can under certain circumstances be possessed legally. It then held:

12.1 that it could well be that possession of the former type of objects would not be restored in the case of spoliation, but that this issue was not before the court and did not have to be decided;

12.2 that possession of the latter type of object would be restored in the case of spoliation, because in such cases an enquiry would be necessary to establish whether in the particular circumstances possession would be illegal, and because such an enquiry would be impermissible in spoliation proceedings, as it would constitute an enquiry “*into the merits of the lawfulness of the applicant’s possession*”, which would be irrelevant for purposes of spoliation proceedings; and

12.3 that a vehicle of which the chassis number has been tampered with, is an object that can under certain circumstances, and more particularly where there is “*lawful cause*”⁴, be possessed legally, and that the Supreme Court of Appeal had erred in not recognising this.

⁴ In terms of section 68(6)(b) of the **National Road Traffic Act**, 93 of 1996, “No person shall **without lawful cause** be in possession of a motor vehicle of which the engine or chassis number has been falsified, replaced, altered, defaced, mutilated, or to which anything has been added, or from which anything has been removed, or has been tampered with in any other way”. (My emphasis)

[13.] The Constitutional Court did, however, not:

- 13.1 overrule the *ratio decidendi* in the **SCA Ngqukumba** judgment, at the very least not in respect of objects that could under no circumstances be possessed legally; or
- 13.2 confirm the **Ivanov** judgment insofar as it held that possession of spoliated gambling machines should be ordered even though the applicant's possession thereof would constitute a crime⁵. To the contrary, the recognition by the Constitutional Court that the return of objects that may under no circumstances be possessed legally, may possibly not be competent, is in direct conflict with the approach adopted in the **Ivanov** judgment.

[14.] It appears that the approach of the Constitutional Court of distinguishing between objects which can under no circumstances be possessed legally, on the one hand, and those that can, on the other hand, was motivated by the principle that there cannot in spoliation proceedings be an enquiry into "*the merits of the lawfulness of (an) applicant's possession*". The distinguishing characteristic should then really be the need for an enquiry. In other words, where an enquiry would be necessary to establish whether an applicant could legally possess an object, a court would in spoliation proceedings have to order restoration of possession once it has been established that the applicant had been in peaceful and undisturbed possession and that the respondent had disturbed that possession. On the other hand, where it is common cause that continued

⁵ In the "*Cases cited*" section of the report of the CC Ngqukumba judgment it is noted that the **Ivanov** judgment was approved by that court. This is incorrect. The only reference in the **CC Ngqukumba** judgment to the **Ivanov** judgment is in footnote 15 thereof, where it was pointed out that the **Ivanov** judgment had been overruled in the **SCA Ngqukumba** judgment. Nowhere in its judgment did the Constitutional Court expressly, or even impliedly, prefer the approach adopted in the **Ivanov** judgment over the approach adopted in the **SCA Ngqukumba** judgment, at the very least not as far as objects are concerned that could under no circumstances be possessed legally..

possession would be illegal, an unqualified order that possession be restored, would on this interpretation of the **CC Ngqukumba** judgment not be granted.

[15.] Apart from this the **CC Ngqukumba** judgment has in my view, and with respect, also raised other questions:

15.1 Why would the issue of the legality of the continued possession be relevant where an object is concerned that can under no circumstances be possessed legally, but not where an object is concerned that can under certain circumstances be possessed legally? To put it another way, why would the legality of an applicant's future possession be relevant when it can be decided without an enquiry, but not when an enquiry is necessary?

15.2 Has the Constitutional Court not, in arriving at its findings, "*equated* (the issue of legality) *with the common-law concept of justa causa possessionis*"⁶? It is easy to understand that there cannot in spoliation proceedings be room for an enquiry into the latter, because that would defeat the purpose of the remedy, *viz* to prevent self-help by ordering restoration of possession and obliging the parties to subject the issue of the lawfulness of possession to a court of law. There is no place in spoliation proceedings for an enquiry to resolve "*competing claims to possession*"⁷. However, the concept of legality introduces "*another dimension*"⁸ in the case of an issue like the present, *viz* that of legality, as opposed to lawfulness in the general sense of the word.

⁶ **Marvanic Development (Pty) Ltd and Another v Minister of Safety and Security and Another** 2007 (3) SA 159 (SCA) para [10]

⁷ The **SCA Ngqukumba** judgment, para [14]

⁸ *Ibid*, para [2]

- 15.3 On the approach of the Constitutional Court a court would, simply because there is (or can be) a dispute about whether an applicant can legally possess an object, ignore that dispute, as well as the possibility that continued possession could constitute a crime, and order restoration of possession. This is difficult to understand, because such a dispute would not revolve around the issue of whether the applicant could lawfully possess the object, in the general sense of the word, but would in fact be about whether the applicant could legally possess the object (Even if he or she has a perfectly good *justa causa possessionis*, in the general sense, like ownership). It would in other words not be a dispute about “*competing claims to possession*”.
- 15.4 The fact that possession would in the case of spoliation be restored to a thief⁹, does not in my view assist in the present circumstances. Possession of a stolen object by a thief pursuant to a court order would not constitute a crime. The fact of the order would enable the thief to provide a “*satisfactory account*” for his/her possession of the stolen property¹⁰.
- 15.5 The Constitutional Court has in effect accepted that there may be “*lawful cause*” for the continued possession of a vehicle as envisaged in the provisions of section 68(6)(b) of the **National Road Traffic Act**¹¹. This was done without discussing or interpreting those provisions, and also without dealing with the fact that they have on more than one occasion been interpreted to mean that the phrase “*lawful cause*” in that section could only provide an explanation for past possession (On a charge of having contravened the provisions of that sub-section), but could never provide a justification for the

⁹ Compare the **Ivanov** judgment para [19]

¹⁰ See section 36 of the General Law Amendment Act, 62 of 1955.

¹¹ See footnote 4 above.

continued possession of such a vehicle¹². On the interpretation in those cases of the provisions of that section the vehicle concerned in the matter before the Constitutional Court would, ironically, indeed have been an object of which the continued possession could under no circumstances be legal.

THE JUDGMENT OF THE COURT A QUO

[16.] The court *a quo* could not, of course, apply the **SCA Ngqukumba** judgment without qualification, because the legislation regulating the continued possession by the applicants in the two matters differed. If the court *a quo* was bound to follow the **SCA Ngqukumba** judgment, it would therefore have been bound to only the principle that possession was not to be restored when such possession would be illegal.

[17.] On the other hand, if the court *a quo* had to follow the **Ivanov** judgment, the return of the machines would have had to be ordered, regardless of whether continued possession thereof by the appellants would be illegal.

[18.] Before us Mr Jagga referred to section 18(1) of the **Superior Courts Act**¹³. The relevant provisions of that section read as follows:

*“....., and unless the court under exceptional circumstances orders otherwise, the **operation and execution** of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.”* (My emphasis)

¹² See **Minister van Veiligheid & Securiteit v Delpont NO en ‘n ander** [2003] JOL 11900 (NC); **Marvanic Development (Pty) Ltd and Another v Minister of Safety and Security and Another**, *supra*; **Basie Motors BK t/a Boulevard Motors v Minister of Safety and Security** 2006 JDR 0251 (SCA); **SA Truck Bodies (Pty) Ltd v The Minister of Safety and Security** 2010 JDR 0850 (NCK); **Pakule v Minister of Safety and Security and Another**; **Tafeni v Minister of Safety and Security and Another** 2011 (2) SACR 358 (SCA)

¹³ 10 of 2013

- [19.] Subsection (5) of section 18 goes on to provide that “*a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules*”.
- [20.] Mr Jagga argued that the suspension of the “*operation and execution*” of a decision would include the suspension of “*its effect as a binding judgment*” for purposes of the *stare decisis* doctrine and that, pending the finalisation of the appeal by the Constitutional Court, the court *a quo* would have been obliged to follow the **Ivanov** judgment.
- [21.] This argument was also raised in the court *a quo*. It appears, from the judgment of the court *a quo* and from the heads of argument at that stage of Mr Jagga¹⁴, that Mr Jagga had at that stage based his argument on the common law principles regarding the suspension of judgments in circumstances like these, and that both he and Williams J had approached this issue on the premise that, because Uniform Rule 49(11) did not apply to judgments in respect of which the Constitutional Court would be approached for leave to appeal, such cases had to be dealt with on the basis of the common law principles applicable in circumstances where leave to appeal is sought.
- [22.] Williams J then went on to hold, with reference to **Sirioupoulas v Tzerefos**¹⁵, that it was in terms of the common law not the filing of an application for leave to appeal that suspended judgments and orders, but indeed the noting of the appeal, and that the **SCA Ngqukumba** judgment would therefore only have been suspended once leave to appeal had been granted and an appeal had been noted.

¹⁴ Who had also then represented the appellants.

¹⁵ 1979 (3) SA 1197 (O) at 1202 G

[23.] It was not debated before us whether this would have been the correct approach at the time of the hearing of the applications on 2 August 2013, nor was it debated whether it would still have been the correct approach by the time that the judgment of the court *a quo* was delivered on 6 September 2013. By then the **Superior Courts Act**, including the provisions of section 18(1), had already come into operation¹⁶. In view of what follows it is, however, not necessary to decide this now.

[24.] Williams J in any event also held, with reference to **Zweni v Minister of Law and Order**¹⁷, that such a “*suspension*” would only have applied to the “*pronouncement of the disposition*”, and not to the “*ratio decidendi or reasons*” for that pronouncement. I must say that I find this reasoning persuasive, but in view of what follows it is once again not necessary to decide this, because it will not make any difference to the outcome of this appeal.

[25.] In paragraph 5 of the judgment in the court *a quo* the following was stated:

“The issue in both applications relate solely to the restoration of possession of the gambling machines to the applicants who do not have the requisite licenses or authorisation to possess such gambling machines. The possession of the gambling machines in these circumstances is a contravention of section 9(1) of the National Gambling Act, No 7 of 2004 and constitute an offence under section 82 of the Act.”

[26.] It appears from this that Williams J considered the only issue and dispute to be whether the return of the machines to the appellants should be ordered. The contents of this paragraph contain no mention of it being in dispute that they were indeed gambling machines and that possession thereof by the appellants would indeed be illegal¹⁸.

¹⁶ On 23 August 2013.

¹⁷ 1993 (1) SA 523 (A) at 532D

¹⁸ The only other issue was whether the warrants were invalid, but that was apparently conceded by the respondents.

- [27.] The problem is that, on the papers in the two applications, it was indeed disputed that the machines were gambling machines as envisaged in section 1 of that Act, and it was the case of the appellants that, even if they were gambling machines, they had been properly registered in terms of the dispensation under the repealed **Northern Cape Gambling and Racing Act**¹⁹, which according to the appellants had resulted in them still having been in legal possession of the machines at the time that they were seized by the police.
- [28.] These averments were disputed by the deponents for the opposing respondents, and that in turn was responded to by the appellants in their replying affidavits. The judgment of the court *a quo* is, however, silent on the conflicting contentions in this regard. There is no indication at all that they were considered and decided upon by the court *a quo*. In fact, the mention of only the one issue in paragraph 5 of the judgment suggests that they had not.
- [29.] Had those contentions been considered and decided, that would probably, on what has since been held by the Constitutional Court, have amounted to an enquiry which the court *a quo* should not have entertained, but that is not necessary to decide now.
- [30.] Mr Jagga assured us that it had at no stage been conceded that the appellants could not legally possess the machines. Mr Fourie, counsel for the first and second respondents in the appeal, was not involved in the hearing of the applications.
- [31.] In my view the contents of paragraph 5 can in no way be interpreted as constituting a finding on this issue, let alone reasons for such a finding. On what is before us, and on what has been conveyed to us regarding the proceedings in the court *a quo*, it appears that Williams J had, at least when delivering her

¹⁹ 5 of 1996

judgment, laboured under the mistaken impression that it was common cause that the machines were gambling machines and that continued possession thereof by the appellants would constitute a crime.

[32.] This would mean that there would, even on the *ratio decidendi* in the **SCA Ngqukumba** judgment, not have been any basis upon which restoration of possession of the machines could be refused.

[33.] Had Williams J, on the other hand, followed the **Ivanov** judgment, she would also have had to order the return of the machines, regardless of whether or not the appellants could legally be in possession thereof.

[34.] It follows that, on both scenarios, the refusal to order the return the machines would have been wrong and that the appeals against this must succeed. There is no reason why the costs of the appeals should not follow such result.

[35.] In the premises the following orders are made:

IN BOTH CASES 1084/13 AND 1085/13 THE APPEALS ARE UPHeld WITH COSTS AND PARAGRAPH b) OF THE ORDERS OF THE COURT A QUO IS IN BOTH CASES AMENDED TO DELETE THE WORDS “WHICH THE APPLICANT MAY LAWFULLY POSSESS”, AND TO READ AS FOLLOWS:

“The respondents are ordered to forthwith return and restore possession of the movable goods and money that were seized at the above-mentioned business premises during the execution of the search warrant referred to above.”

I concur.

P L TLALETSI
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I concur.

M MAMOSEBO
JUDGE
NORTHERN CAPE DIVISION

For the appellants: **ADV. N JAGGA**
 (Instructed by **Van De Wall Inc.**)

For the 1st and 2nd **ADV. J A FOURIE**
respondents: (Instructed by the **Office of the State Attorney**)