



Reportable:	YES/	☒ NO
Circulate to Judges:	YES/	☒ NO
Circulate to Magistrates:	YES/	☒ NO
Circulate to Regional Magistrates:	YES/	☒ NO

HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: 2277/2015

Heard: 23-11-2015

Delivered: 11-12-2015

In the matter between:

W A VAN DER WESTHUIZEN

APPLICANT

AND

**THE MINISTER OF SAFETY AND
SECURITY**

1ST RESPONDENT

LT. KOL ROOSA

2ND RESPONDENT

CAPTAIN MEYER

3RD RESPONDENT

Coram: Kgomo JP et Coetzee AJ

JUDGMENT: LEAVE TO APPEAL

KGOMO JP

1. This is application for leave to appeal to the Supreme Court of Appeal against the judgment of my brother Coetzee AJ, in which I

concurred, which was delivered on 02 October 2015. We made the following order which the Minister of Safety and Security and the police officers who are cited as respondents wish to have reversed:

- “1. *Die besluit deur die eerste respondent in terme waarvan die Jeep Wrangler met die registrasienommer B[....] aan die staat verbeurd verklaar word en die gevolglike verbeurdverklaring hersien en tersyde gestel word.*
2. *Die respondent die Jeep Wrangler met registrasienommer B[....] aan die applikant lewer.*
3. *Die respondent moet, in terme van Regulasie 56(4) `n onderstelnommer aan die Jeep Wrangler met registrasienommer B[....] toeken.*
4. *Die respondent die koste van die aansoek betaal.”*

2. What I wish to deprecate, in the first place, concerning this application is that: For this straightforward application the grounds are needlessly excessive and comprise 10 typed pages; many of the grounds are repetitive and/or overlap; some grounds are argumentative and unduly long and the grounds rather have the appearance of heads of argument for being liberally interspersed with decided cases. In **Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, Fifth Edition, Vol 2** at p 1158, the authors comment:

“It has been held that the grounds of appeal required under rule 49(1)(b) must be clearly and succinctly set out in clear and unambiguous terms so as to enable the court and the respondent to be fully informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal.”

3. In **Songono v Minister of Law and Order** 1996 (4) SA 354 (E) at 385C-H Leach J (then) made this trenchant remarks in this regard:

"In attempted compliance therewith the applicant filed a document headed 'Application for leave to appeal', in which he purported to set out the grounds upon which leave to appeal was to be sought. These so- called 'grounds' constitute a diatribe of some 17 pages criticising the judgment, analysing (at times incorrectly) certain of the evidence and the findings made, putting forward certain submissions and quoting various authorities. This lengthy, convoluted and at times disjointed criticism of the judgment did not clearly and succinctly spell out the grounds upon which leave to appeal is sought in clear and unambiguous terms - indeed, it served more to deceive ---.

*Rule 49(3) is couched in similar terms [as Rule 49(1)(b)] and also requires the filing of a notice of appeal which shall specify 'the grounds upon which the appeal is founded'. In regard to that subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, inter alia, to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised. Accordingly, insofar as Rule 49 (3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet - see, for example, **Harvey v Brown** 1964 (3) SA 381 (E) at 383; **Kilian v Geregsbode, Uitenhage** 1980 (1) SA 808 (A) at 815 and **Erasmus Superior Court Practice** B1-356-357 and the various authorities there cited."*

4. There is obviously no need to rehash the facts and findings of the judgment of Coetzee AJ because all the material issues raised in the application are covered or are answered in the judgment. Three matters will be briefly dealt with, though.

5. The first is that the appellant contend that we erred to have relied on the Constitutional Court judgment in **Nggukumba v Minister of Safety and Security and Others** 2014 (5) SA 112 (CC) para 21 to answer the question whether the vehicle could be restored to the applicant, Mr Van der Westhuizen. The vehicle has been owned and possessed by Mr Van der Westhuizen since 1986 until it was impounded by the police on 27 March 2012; a period of 26 years. It would have reached vintage-car status in earlier years. Not a shred of credible evidence has been produced by the police showing that the vehicle is reasonably suspected to have been stolen. The police have had the vehicle in their possession for three years and eight months without a court order. What more is there to investigate? The opening sentences of para 21, which the police wish us to distinguish the case serving before us from read as follows:

“[21] Possession of the vehicle by the applicant pursuant to its return in terms of a court order would be unlawful only if it were established that he did not have lawful cause to possess it. That is a conclusion that can only be reached after an enquiry into the facts surrounding the applicant's possession. Before that enquiry, one is not in a position to say the applicant's possession of the vehicle will be unlawful — it may or may not be, depending on the result that the enquiry would yield. The question that arises is: in proceedings for a spoliation order, is it proper to hold that enquiry? I say not. That would be enquiring into the merits of the lawfulness of the applicant's possession.”

That enquiry has been held in the present case. We have dealt with merits. We found that the police case lack merit.

6. A second aspect to deal with is that we erred in relying on the decision of **Minister Van Wet en Orde en 'n Ander v Datnis Motors (Midlands) Edms** BPK 1989 (1) SA 926 (A) to determine who bears what onus. In the **Datnis case** the Court held that the state had to show on a preponderance of probabilities that the person from whom the object had been seized could not legally possess it and therefore was not entitled to its return. At 934J - 935G. This determination has not been disturbed by the ConCourt in the **Nqgukumba case**.

7. In the **Nqgukumba case** at 119B- 120C (paras 13 and 15) the Court held:

“[13] It matters not that a government entity may be purporting to act under colour of a law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law. Surely then it should make no difference that in dispossessing an individual of an object unlawfully, the police purported to act under colour of the search and seizure powers contained in the Criminal Procedure Act. Non-compliance with the provisions of the Criminal Procedure Act in seizing a person's goods is unlawfull ---.

[15] It seems to me that on this subject the Supreme Court of Appeal proceeds from the premise that a tampered vehicle is no different from an article the possession of which would be unlawful under all circumstances. That is an erroneous premise because possession of a tampered vehicle will be unlawful only if it is 'without lawful cause'. That leads me to a crucial point of departure. It is that in this case we are not concerned with objects the possession of which by ordinary individuals would be unlawful under all circumstances. Had we been concerned with objects of that nature, then the

mandament van spolie might well not be available; but that issue is not before us and need not be decided. The fact that we are here concerned with an article that may be possessed quite lawfully makes all the difference. On the assumption that an individual can never possess heroin lawfully, the Supreme Court of Appeal's heroin example is not apt. At the risk of repetition, the simple point of distinction is that an individual can possess a tampered vehicle if there is lawful cause for its possession."

8. Adv C Botha, for the Minister and the police, wishes to scrum away from the **Nggukumba case** but relies on some of the cases which the ConCourt had regard to in para 5 of its judgment. However, as pointed out above the ConCourt specifically overruled their ratio in respect of which the Supreme Court of Appeal decided that, in similar manner as the drug heroin, such a vehicle cannot be lawfully possessed except when it is cleared or its possessions is regularised by the police as a point of departure. The Concourt referral to the following decisions: **Pakule v Minister of Safety and Security and Another**; **Tafeni v Minister of Safety and Security and Another** 2011 (2) SACR 358 (SCA) ([2011] ZASCA 107); **Absa Bank Ltd and Another v Eksteen** [2011] ZASCA 40; **Basie Motors Bk t/a Boulevard Motors v Minister of Safety and Security** [2006] ZASCA 35; and **Marvanic Development (Pty) Ltd and Another v Minister of Safety and Security and Another** 2007 (3) SA 159 (SCA) ([2006] ZASCA 18).

The point which Mr Botha wishes to make is obscure and must be rejected.

9. The third issue to address is the police's contention that we erred in not having considered ourselves bound by the judgment of the Full Bench of this Division in **SA Truck Bodies (Pty) Ltd t/a Trail Star v Minister of Safety and Security and Another** (2010) JOL

25885 (NCK) (Kgomo JP: with Lacock J et Mjali AJ concurring) where the following is stated at para 21:

“21. The next question that calls for determination would be whether the appellants have shown that they have lawful cause to possess the trailers.”

What the Full Bench in **SA Truck Bodies** (above) was investigating was whether the appellant in that case has satisfied the requirement enunciated as follows by Lewis JA **in Marvanic Development (Pty) Ltd & Another v Mnister of Safety and Security & Another** 2007 (3) SA 159 (SCA) at 163B-C (para 11 thereof):

*“[11] This does not mean that the appellants cannot recover the vehicles at all: it was common cause that they could have applied for what is termed a 'SAPVIN' number for each vehicle from the South African Police Services and that, when issued, they would be entitled to possess lawfully. Regulation 56 of the National Road Traffic Regulations 2000 provides the means for a vehicle owner (or person otherwise entitled to possess the vehicle) to obtain from the police new engine or chassis numbers where these have been tampered with, and a police clearance will be issued to the registering authorities. **The regulation itself shows precisely what s 68(6)(b) means: until the regulation has been complied with, possession by any person other than the police is without lawful cause.** The appellants have apparently not applied to the police for new chassis numbers. The remedy is in their hands.”* (Own emphasis).

Be that as it may, we cannot be bound by a Full Bench (three Judges) decision whose ratio decision runs counter to SCA or Concourt judgment in terms of the precedent system See: **EX PARTE Minister of Safety and Security and Others: IN RE S v WALTERS** 2002 (2) SACR 105 at p 135d-138c (paras 55-61).

10. On 11 September 2015 Phatshoane J et Mamosebo AJ of this Division delivered a judgment in **Abel Daniel Ferreira v The Minister of Safety and Security and Another**, Case No 1696/2015 (unreported). At paras 36 and 37 of that judgment Phatshoane J held:

“36. On a conspectus of the objective facts, it cannot be said that the only reasonable inference to be drawn is that the chassis number was tampered with [with] the intention to deceive or to falsify. That intention is not apparent in this case. I also do not believe that Econotest would, if there was anything untoward, go as far as putting their name to the VIN tag risking reputational damage. What is further to the advantage of the applicant is that he bought the vehicle at an auction sale after it had gone through several previous owners over many years and was cleared countless times by the relevant authorities, including the police.

To my mind, there had been in this case a premature forfeiture declaration of the vehicle; without any proper prior investigation; at the time the vehicle could hardly have been labelled unidentifiable. It follows that the decision by Lt-Col Horak stands to be reviewed and set aside.

37. *What then remains is whether the applicant, having acquired lawful ownership of the vehicle, had lawful cause to possess it in circumstances where there was an enhancement or tampering with the chassis number. The answer to this question is to be found in **Ngqukumba v Minister of Safety and Security and Others** 2014 (5) SA 112 (CC). That case concerned whether s 68(6) precluded an order in spoliation proceedings for the restoration of possession of a tampered-with motor vehicle which had been unlawfully seized by the police.”*

The Court set aside the forfeiture to the state decision by the police and gave certain directives. The case before us is on all fours with the **Ferreira case**, which I support.

11. The Minister and the police have no defence or cogent explanation for impounding the vehicle *in casu*. The conduct of the police is now bordering on being spiteful. Hopefully the Minister was fully and properly briefed on this matter. They cannot confiscate a law-abiding citizen's property without good cause or deprive the said Mr Van der Westhuizen of his property arbitrarily. This saga has been going on from 27 March 2012 and going for four years. In the **Ferreira matter** (*supra*) the vehicle was impounded on 05 October 2010 by the police. These type of cases must be disposed of more expeditiously, for good reason.
12. This whole exercise has now become a waste of tax-payers' money. There are no reasonable prospects of a success appeal.

Order

The application for leave to appeal is dismissed with costs.

F DIALE KGOMO
JUDGE PRESIDENT
 Northern Cape High Court, Kimberley

I concur.

W J COETZEE
ACTING JUDGE
Northern Cape High Court, Kimberley

Counsel:

For the Applicant:

Instructed by:

For the Respondents:

Instructed by:

Adv Reynders

ENGELSMAN MAGABANE ATTORNEYS

Adv C H Botha

OFFICE OF THE STATE ATTORNEY