

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE HIGH COURT: MTHATHA

CASE NO: 380/12

Heard on: 01/02/13

Delivered on: 28/02/13

In the matter between:

ANDILE MAGODA

Applicant

and

MINISTER OF SAFETY & SECURITY

1st Respondent

THE COMMANDING OFFICER-

VEHICLE IDENTIFICATION UNIT

GROUP 46-MTHATHA

2nd Respondent

AND

CASE NO: 381/12

BEBETHO MXHEGO

Applicant

and

MINISTER OF SAFETY & SECURITY

1st Respondent

THE COMMANDING OFFICER-

VEHICLE IDENTIFICATION UNIT

GROUP 46-MTHATHA

2nd Respondent

JUDGMENT

NHLANGULELA J:

[1] An application was made on behalf of both the applicants and respondents that these two cases be heard together because they have identical issues of facts and law and a decision in one will apply to the other.

I granted such application. Accordingly, I deal with both matters in this judgment for the purposes of convenience.

[2] In both applications the applicants seek confirmatory relief that the search and seizure of certain motor vehicles by the police, without a warrant having been obtained in terms of ss 21 and 22 of the Criminal Procedure Act 51 of 1977 be declared unlawful. Further, they seek an order that if the declarator is granted, the possession of the motor vehicles be restored to their possession *status quo ante*; and that the respondent be interdicted and restrained from interfering with such possession unlawfully.

[3] The relief originally sought that the respondents be ordered to issue the motor vehicles with SAPS numbers in order to enable same to be driven on a public road was abandoned by the applicants.

[4] The applicant in the first application, Mr Magoda, and the applicant in the second application, Mr Mxhego, are related to each other. Mr Mxhego is the uncle to Mr Magoda. Both reside in homesteads which are adjacent to each other at Blackhill Administrative Area, Qumbu. Mr Mxhego is

married and he resides at his homestead with his wife, one Nandipha Somdaka, and a daughter, one Nosisi Mxhego.

[5] Mr Magoda is alleged to be the owner of a motor vehicle which is described as a Toyota Hilux with registration letters and number DWZ 963 EC (the Toyota). Mr Mxhego is also alleged to be the owner of a motor vehicle which is described as a Nissan Sentra with registration letters and number WGX 247 GP (the Nissan).

[6] The circumstances which gave rise to the launching of the applications are these: On a certain day in February 2012 the members of the Vehicle Identification Unit, Kokstad who are in the employ of the State, in the department of South African Police Service searched for and found the Toyota and Nissan parked in the homestead of Mr Mxhego. They inspected these vehicles under the bonnet and found that the Toyota had the following features, namely:

- (a) The chassis number LN560165339 was cut out from another vehicle and re-welded.
- (b) The engine number 2L1944261 was ground off and re-stamped; and
- (c) The manufacturer's tag was removed and replaced.

The Nissan was found with the following features, namely:

- (a) The chassis number M053145 was ground off and re-stamped, but not by the manufacturer.
- (b) The engine number E13S051281D was removed and re-stamped, but not by the manufacturer.
- (c) The manufacturer's tag number (400) 0034217 had been removed and replaced, but not by the manufacturer.

[7] In the light of the irregularities with the two motor vehicles so found the police came to the conclusion that the applicants cannot lawfully possess such motor vehicles; and they proceeded to seize and remove them to the police pound.

[8] It is the applicants' case that the removal of the vehicles is unlawful to the extent that the police violated their possessory rights under the doctrine of *mandament van spolie*. A reference to the statement made by Mhlantla JA in the case of *Svetlov Ivancmec Ivanov v North West Gambling Board and 5 Others* (312/2011) [2012] ZA SCA (31 May 2012) will help in understanding the applicants' cause of action. The learned Judge of Appeal said at page 12, para [19]:

“The historic background and the general principles underlying the *mandament van spolie* are well established. Spoliation is the wrongful deprivation of another’s right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a *mandament van spolie* restoring the *status quo ante*. The first, is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant – that is why possession by a thief is protected. The second, is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant as that would go to the merits of the dispute.”

See also: *Nino Bonino v De Lange* 1906 TS 120 at 122.

[9] The duty to prove *mandament van spolie* falls on the applicant. See: *Runsins Properties v Ferreira* 1982 (1) SA 658 (SECLD) at 669.

[10] The facts alleged by the applicants towards satisfying the requisites for *mandament van spolie* are not straight forward. Mr Magoda alleges in the founding affidavit that he had kept the Toyota in the premises of Mr

Mxhego for safe-keeping since he had gone away from home. When the police arrived at the premises they were received by Nosisi Mxhego, a 13 years old daughter of Mr Mxhego, who could not have been able to give valid consent for the search as she was a minor and who had not been authorized to give consent for it. Mr Mxhego also made the same allegations with regard to the capacity of Nosisi to give consent. Attempts by Nosisi to supply cellphone numbers of the owners of vehicles were thwarted by the force exerted by the police in inspecting the vehicles. After that they towed the vehicles away to the premises at the Vehicle Identification Unit, Group 46, Mthatha. This is a police pound. The police informed Nosisi that any queries may be made by the owners at the pound. As a result on 04 and 08 February 2012 he and Mr Mxhego proceeded to the pound where they made claims for the return of the vehicles. On each of those visits the police obfuscated their efforts by disavowing knowledge of the circumstances under which the vehicles were searched and seized and the names of the investigating officer responsible for the vehicles were concealed. In the circumstances the applicants conclude that no search warrant could have been issued had the police sought one before conducting a search and seizure of the vehicles. Nosisi Mxhego confirmed the facts set out in the affidavits of the applicants.

[11] Admitting as it were that the applicants were in possession of the Toyota and Nissan, Warrant Officer Jimmy Desmond Marais avers in the answering affidavit that on 01 February 2012 he received information from an informer that there were stolen motor vehicles which were being kept at a certain homestead in Blackhill Administrative Area, Qumbu. On 02 February 2012 he together with the informer, Constable V. Jiba, Constable K.J. Jantjies and Captain Van Wyk proceeded to Blackhill. Captain Van Wyk was their commander. Upon reaching Blackhill the informer pointed to the homestead of Mr Mxhego and the motor vehicles which were parked in the premises of the homestead. After conducting some investigations, the details of which were kept secrete, Mr Marais and the members of his team entered the homestead. They were received by Nandipha Somdaka to whom they introduced themselves as policemen and asked for permission to conduct a search in respect of the Toyota and Nissan. They were informed that Mr Mxhego had gone away to work in the Johannesburg mines. Nevertheless the wife granted the permission as sought by the policemen to conduct a search. Mr Jiba was tasked to conduct a search in respect of the Toyota. Mr Marais searched the Nissan. Upon discovering the irregularities as aforementioned the police towed the vehicles to Qumbu Police Station, and later on to the police pound. An enquiry docket described as Mthatha

CAS 24/02/2012 was opened for further investigation and handed over to Detective Constable Lwandile Ncapayi, who conducted further investigations. In the confirmatory affidavit Mr Ncapayi states that the Toyota was discovered to have been reported stolen on Edenvale CAS 195/06/1998. Investigations are continuing in respect of the Nissan.

[12] The facts in these cases reveal that what triggered a search and seizure for the Toyota and Nissan was the information that the vehicles parked at the premises of Mr Mxhego were stolen vehicles, the consent given to the police to conduct the search and the discovery of irregularities on the vehicles and a belief by the police that they would have obtained a warrant from the magistrate to conduct a search and seize the vehicles had an opportunity existed for them to obtain it. It is on those facts that the applicant must discharge onus to prove that requisites of *mandament van spolie*. But there is a conflict of facts with regard to the issue of consent. When this was raised by the Court during arguments both *Mr Notyesi* and *Mr Zilwa*, the attorney and advocate who appeared on behalf of the parties reached an agreement that the conflict should be resolved on the basis of the respondents' version, unless any denial made by the respondents is demonstrably not *bona fide*, and so groundless that the appellants' factual

averments can be accepted as stated in the case of *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634.

[13] The allegations made by the applicants that the police were received by Nosisi Mxhego does not make sense as such a person cannot be 13 years of age and at the same time be regarded as an adult person that Nosisi has alleged in the confirmatory affidavits to be. Further, applicants allege that Nosisi received the police on 01 February 2012. And Nosisi confirmed that date. On the other hand the police averred that they arrived at the homestead of Mr Mxhego on 02 February 2012, and they were received by Nandipha Somdaka. The rule in *Plascon-Evans* case being applied to the facts warrants the conclusion that the police went to the homestead of Mr Mxhego on 02 February 2012 and that they were received by his wife who gave the necessary consent for the searching of the vehicles. Consequently, the contention advanced by *Mr Notyesi* that Nosisi had no capacity to give consent, either due to youthfulness or the alleged force applied by the police, has no merit. To that end, the reliance on the statement of Miller J in the case of *Magobodi v Minister of Safety and Security and Another* 2009 (1) SACR 355 (Tk) at 360g that the consent given must be voluntary for a

search to be justified cannot assist the applicants because Nandipha Somdaka is an adult person having capacity to give or withhold consent.

[14] In the ordinary cause, it will be observed that the applicants' failure to prove that consent was not given for their vehicles to be searched and seized would render them unsuited for the remedy of *mandament van spolie*. However to the extent that searches conducted in terms of s 22(a) (consent) of the Criminal Procedure Act 51 of 1977 (the Act) are permitted subject to certain pre-conditions listed under s 20 of the Act the statement of law in *Sigwebendlana v Minister of Safety and Security*, Case No. 27/94 (Tk) (unreported) that the question of consent becomes entirely irrelevant finds resonance.

[15] The provisions of s 20 of the Act read:

“The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

- (b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.”

In essence the law recognizes that balance should be maintained between the rights of the police to conduct searches and seizures unhindered by the cumbersome procedural requirements relating to obtaining a search warrant and the rights of possession accorded to citizens under s 14(b) and (c) of the Constitution of the Republic of South Africa, 1996. These subsections provide that everyone has a right to privacy, which includes the right not to have their property searched or their possessions seized. But the tension experienced in the exercise of maintaining balance of these rights makes the task of the courts a difficult one.

[16] The Legislature enjoins the respondents to prove by credible evidence that the seizure of the Toyota and Nissan complied with the provisions of s 20 of the Act. That is, the scheme of Chapter 2 to the Act is such that even if consent to search a vehicle is obtained the ultimate seizure (dispossession)

thereof must comply with the provisions of s 20 strictly. Failure on the part of the police to show that the seizure was in compliance with s 20 will render the seizure unlawful, and the removal of the vehicles from Blackhill to the police pound an act of spoliation entitling the applicants to restoration *ante omnia* regardless of the fact that they would not, at the time of search and seizure, have been entitled to possess them in terms of s 68(6)(b) of the National Road Traffic Act 93 of 1996, which provides:

“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.”

In terms of s 89(ii) of the same Act possession of a falsified motor vehicle is a criminal offence.

[17] In the circumstances it behoves the respondents to show that the decision taken by the police to seize the vehicles falls within the purview of s 20 of the Act. The proper approach to be adopted in applying the section was considered by Didcott J in the case of *Ndabeni v Minister of Law and*

Order and Another 1984 (3) SA 500 (D and C.L.D.) at 511D-E. The Learned Judge said:

“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 “(T)here can only be reasonable cause to believe...where, considered objectively, there are reasonable grounds for the belief... It cannot be said that an officer has reasonable cause to believe... merely because he believes he has reasonable cause to believe.”

[18] Therefore, the facts that informed Mr Marais to seize the motor vehicles of the applicants must be based on reasonable grounds. *Mr Notyesi* submitted that there is paucity of information supplied in the answering affidavit upon which a belief held by Mr Marais could be tested, and such information goes against the grain of authority as seen in the cases of *Sigwebendlana v Minister of Police*, Case No. 27/94 (Tk) unreported) and *Hiya v Minister of Safety and Security And Another*, Case No. 506/99 (Tk) dated 19/11/99 (unreported), in which it was stated that the information

given to the police by an informer must be a sufficiently detailed information placed before the court on which a reasonable belief is based. These authorities commend themselves to me, otherwise it would be unthinkable that a court could be in a good position of assessing if the information given to Mr Marais was objectively reasonable grounds justifying the seizure of the vehicles.

[19] I can only see the averments made by Mr Marais in paragraph 7 of the answering affidavit as being the only information that could have given rise to a suspicion on the mind of Mr Marais that the vehicles were stolen vehicles. They read:

“During the evening of 1 February 2012, I received information from my informer to the effect that there were stolen vehicles being kept at certain homestead and (*sic*) Blackhill Location at Qumbu in the Eastern Cape Province.”

[20] Inevitably, the debate here must centre around the words “stolen vehicles”. This, in my view, is a subjective conclusion because facts from which it is drawn lack objectivity. I cannot decipher from those words any descriptive features that distinguish the Toyota and Nissan from other

vehicles. What becomes clear is that Mr Marais could not be able to make up his own mind other than to transplant the mind of the informer into his own. And this is completely an undesirable approach to policing one has regard to the concern expressed by the Full Bench in the case of *Hiya, supra*, that the information used must be reliable lest men with axes to grind are permitted to criminalise members of society unfairly. In *Sigwebendlana, supra*, at 3, Davis stated appositely as follows:

“What was required at least was for the sergeant to allege that the information came from a reliable source and to explain in some detail what it was and why it would be contrary to public policy or the interests of the administration of justice to disclose more details. All that he says, in effect, is that it would interfere with the administration of justice. On this first point then I conclude that respondent, who admittedly bears the burden of proof, has not shown that the vehicle fell within the terms of section 20 of the Act.”

[21] Based on the cases of *Ndabeni* and *Sigwebendlana, supra*, I find that the belief held by the police that the vehicles were stolen vehicles was not informed by objectively reasonable grounds. Consequently, the seizure of the vehicles is not one that falls within the purview of s 20 of the Act.

[22] The contention advanced on behalf of the respondents is that since the provisions of s 89 of Act 93 of 1996 forbid possession of the vehicles by the applicants, restoration of possession is not possible. This contention must be given a short shrift because the Full Bench in the case of *Sitonga v Minister of Safety and Security and 2 Others* 2008 (1) SACR 376 (Tk) at para. [37] decided that:

“Whilst it may result in the applicant in spoliation proceedings being placed in possession of an article he or she may otherwise not lawfully possess, it should be borne in mind that the *mandament van spolie* affords no more than temporary relief. The respondent can, subsequent to the applicant having been restored in his or her possession, seek judicial dispossession, ejectment or other appropriate relief. Applied to the facts of the present matter, it is always open to the respondents to seek lawful dispossession of the vehicles in terms of the provisions of section 21 read with section 20 of the Criminal Procedure Act.”

[23] The applicants in both matters have achieved success in their applications. They are entitled to the costs thereof.

[24] In the result the following order shall issue:

1. That the search and seizure of the applicants' motor vehicles described as:

(a) A Toyota Hilux with registration letters and number DWZ 936 EC; and

(b) A Nissan Sentra with registration letters and number WGX 247 GP;

be and are hereby declared unlawful.

2. That the respondents be and are hereby directed to release the motor vehicles as aforementioned forthwith.

3. That the respondents be and are hereby interdicted and restrained from unlawfully interfering with the applicants' possession of the motor vehicles.

4. That the first respondent pay costs of the applications.

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the applicants : Mr M. Notyesi
c/o Mvuzo Notyesi Inc
MTHATHA

Counsel for the respondents : Adv PHS Zilwa
Instructed by : The State Attorney
MTHATHA