

**IN THE HIGH OF SOUTH AFRICA
(EASTERN CAPE DIVISION: MTHATHA)**

CASE NO: 1354/2010

In the matter between:

ANELE NGQUKUMBA

APPLICANT

AND

MINISTER OF SAFETY AND SECURITY

1ST RESPONDENT

STATION COMMISIONER, MTHATHA

CENTRAL POLICE STATION

2ND RESPONDENT

COMMANDING OFFICER, VEHICLE

SAFEGUARD UNITY, GROUP CC

MTHATHA

3RD RESPONDENT

JUDGMENT

PAKADE ADJP:

[1] This judgment concerns an application for leave to appeal launched by the applicant against paragraph 2 of the judgment which was delivered on 20th October 2011. The portion of the judgment which is appealed against

by the applicant reads as follows:

“[39] The following order is therefore made:

1.....

2. the retention of the same motor vehicle by the members of the South African Police Service in Mthatha is declared lawful until such time the police clearance certificate is issued and the vehicle re-registered under the National Road Traffic Act, 93 of 1996;

3. Each party is ordered to pay its own costs”.

[2] The grounds of appeal were couched in the following terms:

2.1 Recourse being had to the fact that-

“(a) The proceedings were in the nature of a *mandament van spolie*;

(b) Lawfulness of possession is not a justifiable defence in spoliation proceedings; and

(c) The purpose of a *mandament van spolie* is to restore possession *ante omnia*, the court, having declared the seizure of the motor vehicle unlawful, erred in declaring that the detention of the said motor vehicle was lawful until the applicant produces a police clearance certificate issued in terms of the National Road Traffic Act, 1996 (Act 93 of 1996).

2.2 The court also erred in invoking and basing its findings regarding the applicant’s entitlement to the release of the motor vehicle on section 31 of the Criminal Procedure Act, 1977 (Act 51 of 1977). The court further erred in finding that it was bound by the judgment in

Phakule and Tafeni vs Minister of Safety and Security and another¹ as the Phakule judgment is distinguishable from the instant case in that the SCA's refusal to release the motor vehicle stemmed from the fact that the court found the search and seizure of the motor vehicle to have been lawful.

2.3 The court further erred in directing the applicant to pay the costs of the application, the applicant had been substantially successful in his application.

2.4 The court should have accordingly granted the applicant all the relief sought, and therefore erred in not doing so.”

[3] The application for leave to appeal was subsequently amended by the substitution of paragraph 2.3 of the following paragraph:

“3. Having found that the seizure of the applicant's motor vehicle was unlawful but that its subsequent detention was lawful until such time as police clearance certificate is issued and the motor vehicle is registered under the National Road Traffic Act, the court ordered each party to pay their own costs. The discretion exercised by the court in so directing was based on a wrong principle, a wrong view of the facts, and/or in the violation of the well recognized principle that an applicant is entitled to his costs if he has been substantially, alternatively, partially successful. The applicant in *hoc casu* had been substantially successful in his application. The court accordingly should have directed the respondent to pay the costs of the application”.

[4] In all the three judgments of the Supreme Court of Appeal² on which my

¹ 2011(2) SACR 358 (SCA)

² Basie Motor BK t/a Boulaverd Motors v Minister of Safety & Security [2006] JOL 17057 (SCA); Marvanic Development (Pty) Ltd v Minister of Safety & Security 2007(3) SA 159 (SCA) and Phakule and Tafeni v Minister of Safety & Security (footnote 1)

judgment on the paragraphs which are sought to be impugned is based, the cause of action was founded on ownership and not on spoliation as was the case in *hoc casu*. The distinction between the case in *hoc casu* and those cases is clear from the judgment of Mpati DP (“as he then was”) in *Basie Motors BK t/a Boulevard Motors vs Minister of Safety and Security* at paragraph [14] when he said:

“It is well to remember that we are not here dealing with items that had been spoliated from the appellant. The two vehicles were seized by the SAPS on the strength of search warrants issued under s 20 of the Act and the claim for their return is based on s 31(1)(a)”

The same point is reinforced by Lewis JA in *Marvanic Development (Pty) Ltd vs Minister of Safety and Security* where the learned judge had this to say in paragraph [8]:

“The appellants contend that simply by virtue of their ownership of the vehicles their possession will be lawful if the vehicles were returned to them”

Quite significantly the Court in those cases had to enquire into the legality or otherwise of the possession of the motor vehicles if they were to be returned to their owners, which is not the case when one is dealing with spoliation. The legality or otherwise of the possession is not relevant in spoliation proceedings as the thief can also possess a stolen item.

[5] There is, in law, a clear distinction between spoliation and *rei vindicatio* as causes of action and the line between them must not be blurred. There is a long line of judgments in this Division³ which are based on spoliation and

³ Mentioned in par 35 of the main judgment of *Anele Ngqukumba v Minister of Safety & Security* to which list could be added the Full Bench judgment of *Sithonga v Minister of Safety & Security & others* 2008(1) SACR 376 (TK)

which Advocate Matyumza for the respondent contends that they were wrongly decided. I respectfully do not agree with his observation in this respect because if I were to adopt it I would be saying that spoliation remedy is the same as the remedy of the *rei vindicatio*. In my view, the SCA in the Phakule and Tafeni judgment seems to have kept the distinction live between spoliation and *rei vindicatio*, distinguishing the Hiya judgment, which deals with spoliation. It is on this basis that I bundle the three SCA judgments as judgments that are dealing with *rei vindicatio* and thus entitled to look at the legality or otherwise of possession.

[6] On this basis, there may be some merit in the submission made by Mr Mbenenge SC that I failed to delineate the distinction between the facts of the case in *casu* and the facts as well as the law applicable in the SCA judgments. On this basis it may well be that another court may find differently from what I have found to be the case.

[7] In the circumstances I grant the following order:

ORDER

1. The applicant is granted leave to appeal to the Supreme Court of Appeal against paragraph 2 and 3 of the judgment which was delivered on 20 October 2011.
2. Costs of this application shall be costs in the appeal._

LP Pakade

ACTING DEPUTY JUDGE PRESIDENT: MTHATHA

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Date Heard : 03 February 2012
Date delivered : 17 August 2012