IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

CASE NO. 2265/ 2009

In the matter between:

XOLANI MAQHUNYANA	**Applicant**
and	
MINISTER OF SAFETY AND SECURITY	**1st Respondent**
STATION COMMISSIONER, MTHATHA CENTRAL POLICE STATION	**2nd Respondent**
SUPERINTENDENT JINGXA LIBODE POLICE STATION	**4th Respondent**

JUDGMENT

DUKADA, A.J.

INTRODUCTION

[1] The Applicant launched this application against 1st, 2nd and 3rd Respondents in which he sought the following relief :-

1.1. That the search, seizure and continued detention of the Applicant's motor vehicle, to wit, a TOYOTA HILUX with registration letters and numbers CST 905 EC be declared unlawful.

1.2. That the Respondents be directed to release forthwith the motor vehicle to the Applicant.

1.3. That the Respondents be interdicted and restrained from further unlawfully interfering with the applicant's possession of the motor vehicle.

[2] The 1st, 2nd and 3rd Respondents opposed the application and delivered answering affidavits to which the Applicant replied.

[3] Applicant then launched an interlocutory application applying for the joinder of the 4th Respondent and also for the amendment of his Notice of Motion to include a prayer for the following order:-

(a) That the certificate issued by the 4th Respondent attached to the Respondent's answering affidavit being Annexure "VN1" be declared invalid and of no force and effect and be set aside as a nullity.

[4] On the 27th May 2010 an order was granted ordering that 4th Respondent be joined as such, and also granting Applicant leave to amend his Notice of Motion by including the prayer for the order mentioned in [2] above.

[5] Applicant's Notice of Motion was accordingly amended and the Notice of Motion, Answering Affidavits, Replying Affidavit and Court Orders were duly served upon 4th Respondent.

[6] 4th Respondent thereafter delivered his answering affidavit to which Applicant responded by delivering a replying affidavit.

THE FACTS OF THE CASE

[7] Applicant's case is that he bought a motor vehicle, to wit a **TOTOTA HILUX** with registration letters and numbers **CST 905 EC.** He took it to Madeira Police Station, Umtata where it was subjected to thorough inspection and verification to establish whether it was not reported a stolen motor vehicle and also whether there were any tampering with identifying features on it. The police issued a clearance certificate confirming that there was nothing irregular in the motor vehicle and it was later registered into the name of the Applicant. A copy of the motor vehicle licence in respect of this motor vehicle was attached to the papers.

[8] During August 2008 while the said motor vehicle was at NTLAZA taxi rank, Libode it was seized and taken away by police to Mthatha Central Police Station. At Central Police Station, Mthatha the police found no irregularities with the motor vehicle, but they said they wanted to conduct further investigation.
He demanded that the motor vehicle be released to him but the Police refused to do so.

[9] Respondent's case is that on the 7th October 2008 in the morning a road block was set up by Police under Captain Kwanini near St Barnabas Hospital at Ntlaza, Libode by virtue of an authorization in terms of Section 13(8) of the South African Police Service Act No. 68 of 1995 issued by Superintendent Mbuyiselo Killion Jingxi, the Station Commissioner of Libode Police Station, Libode. They stopped this motor vehicle at that road block, examined it and found that its chassis and engine numbers tampered with and also the tags of the manufacturer were removed. As a result of those findings they had reasonable grounds for believing that the motor vehicle was concerned in the commission or suspected commission of an offence or may afford as evidence of the commission of an offence or that it was possessed illegally. They then seized the motor vehicle and towed it away to the Mthatha Vehicle Identification and Safeguarding Section.

DISPARITIES

The Applicant says his motor vehicle in question here was seized and taken away by the police while it was parked at Ntlaza taxi rank during August 2008. On the other hand on behalf of 1st Respondent Inspector VUYOKAZI NTLANTSANA says this motor vehicle was seized by the Police during a Police road block conducted at Ntlaza near St Barnabas Hospital on the 7th October 2008. There is such a disparity as to the date and situation in which this motor vehicle was seized and taken away by the Police.

A document annexed to 1st Respondent's papers marked "VN1" being authorization in terms of Section 13(8) of the South African Police Service Act 1995 (Act No. 68 of 1995) authorized a checkpoint /checkpoints to be conducted at R61 National Road near St Barnabas Hospital at Ntlaza, Libode on the 7th October 2008.

In his founding affidavit Applicant states that the motor vehicle was seized and taken away by the Police from him personally, whereas in the answering affidavit on behalf of 1st Respondent, Inspector Ntlantsana in paragraphs 14, 17 and 19 mentions himself dealing with the "driver of the motor vehicle". In paragraph 9 of his replying affidavit Applicant responding *inter alia*, to paragraphs 14,17 and 19 of the answering affidavit by Inspector Ntlantsana, prefers to use the word driver too, where he says " No irregularities were shown to the driver and in fact the vehicle had no irregularities with it."

Whilst I do not understand the reason for the said disparities, I may say that despite them there are aspects in this matter which are not in dispute as will be shown hereunder.

[10] From a reading of the papers by the respective parties it is not an issue that the Applicant was in peaceful and undisturbed possession of the motor vehicle and that he was deprived of such possession.
The 1st Respondent, however, contends that the dispossession of the motor vehicle of the Applicant was not unlawful by virtue of the fact that the Police Officials derived their authority to seize the motor vehicle from the authorization issued by the Libode Station Commissioner (the 4th Respondent) pursuant to the provisions of section 13(8) of the South African Police Service Act No. 68 of 1995(hereinafter called the Act).

[11] **ISSUES**

There are two issues raised in this matter. The first relates to the validity of the authorization issued in terms of Section 13(8) of the Act. The second issue relates to the question of lawfulness of the search, seizure and continued detention of the motor vehicle of the Applicant.

[12] **LAW**

The authorization concerned in the first issue appears to have been issued in terms of Section 13(8) of the Act. The relevant portions of this section read as follows:-

(a) The National or Provincial Commissioner may, where it is reasonable in the circumstances in order to exercise a power or perform a function referred to in Section 215 of the Constitution, in writing authorize a member under his or her command, to set up a roadblock or roadblocks on any public road in a particular area or to set up a checkpoint or checkpoints at any public place in a particular area.

(b) The written authorization referred to in paragraph (a) shall specify the date, the approximate duration, place and object of the proposed action.

(c) Any member authorized under paragraph (a) may set up a roadblock or roadblocks or cause a roadblock or roadblocks to be set up on any public road in the area so specified or set up a checkpoint or checkpoints or cause a checkpoint or checkpoints to be set up at any public place in the area so specified.

(d) ……

(e) For the purposes of exercising the power conferred by paragraph (c) or (d) a member shall display, set up or erect on or next to the road or at the public place such sign, barrier/or object as is reasonable in the circumstances to bring the order to stop to the attention of the driver of a vehicle approaching the roadblock so as to ensure that the vehicle will come to a stop or to the attention of a person approaching the checkpoint.

(f) Any driver of a vehicle who approaches a roadblock or any person who refuses or fails to stop in accordance with an order to stop displayed as contemplated in paragraph (e) should be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

(g) Any member may without warrant:-

(i) in the event of a roadblock or checkpoint that is set up in accordance with the paragraph (c) search any person or vehicle stopped at such roadblock or checkpoint and any receptacle or object of whatever nature in the possession of such person or in, on or attached to such vehicle and seize any article referred to in section 20 of the Criminal Procedure Act, 1977, found by him or her in the possession of such person or in, on or attached to such receptacle or vehicle; Provided that a member executing a search

under this subparagraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorization by the Commissioner concerned; and

(ii)…….”

[13] Mr Notyesi, who represented the Applicant submitted that this application revolved around the question of the validity of the authorization that was issued by the 4th Respondent in terms of Section 13(8) of the Act. He argued that before issuing the authorization there were no jurisdictional facts on which the 4th Respondent based his decision. He further stated that 4th Respondent has not set out facts which objectively viewed rendered it reasonable in the circumstances of this matter to authorize the setting up of a road block. He went on to say the 4th Respondent in dealing with this pertinent challenge merely contends himself by saying “I deny the allegations contained herein. In amplification hereof I state categorically that I issued the certificate in accordance with the provisions of Section 13(8) of the South African Police but,…… the certificate was issued after I had satisfied myself with the reasons and the cause for conducting of the road block. I support of the certificate I was as well furnished with the necessary documentation.”

He further argued that apart from alleging that “ before the issue of the certificate I satisfied myself in terms of the information that was

placed before me that it was reasonable in the circumstances to authorize the setting up of a road block…… Save to dispute that there was no information before me which rendered it necessary to authorize the setting up of the road block, I have already replied to the issues raised herein in the previous paragraphs", the 4th Respondent who was pertinently called upon to provide the information which led him to issuing the written authorization, has failed to set up facts which support the conclusion that the issuing of the written authorization was reasonable in the circumstances.

Mr Notyesi submitted that both as regards the issuing of the certificate to set up the road block and the actual seizure, the failure by the Respondents to disclose the information and the source of such information providing the reason or motive for both is fatal to the validity of the certificate and to the actual seizure itself.

[14] Mr Gagela, Counsel for the Respondents argued that in paragraph 12 of the answering affidavit of Inspector Ntlantsana she states as follows:-

" The purpose of the road block was inter alia the checking of stolen and/ or motor vehicles whose engine and chassis numbers were tampered with, possession of unlicensed firearms and prevention of crime".

He said this is corroborated by the 4th Respondent in paragraph 3 of his confirmatory affidavit. He argued that the above-quoted

jurisdictional factors were considered by the Station Commissioner when he issued the written authorization and are identical to one of those enumerated in Section 215 of the Constitution Act of 1993. He submitted that it was, therefore, reasonable in the circumstances to have authorized a road block.

Mr Gagela further argued that the Applicant does not state in what manner there has been no compliance with section 13(8) but is merely stating conclusions of law without setting forth factual allegations thereon. He referred me to the case of **ZANDISILE MAZANTSANA v MINISTER OF SAFETY & SECURITY AND OTHERS**, Case NO 765/2002 (an unreported judgment of this Division)

THE VALIDITY OF THE AUTHORIZATION ISSUED IN TERMS OF SECTION 13 (8) OF THE ACT

[15] The most relevant portion of Section 13(8) for purposes of this matter is the following:-

"The National or Provincial Commissioner may, where it is reasonable in the circumstances in the order to exercise a power or perform a function referred to in Section 215 of the Constitution, in writing authorize a member under his command, to set up a roadblock or roadblocks on any public road in a particular area" (my underlining).

[16] As set out in paragraph 13 above it appears that Mr Notyesi interpretes the above portions of Section 13(8) as to require the 4th Respondent to have been in possession of an information which made him to conclude that the issuing of the written authorization was reasonable in the circumstances. He seems to equate this legal situation with the one which should prevail when deciding to authorize the issue of a search and seizure warrant in terms of Section 20, 21, 22 and 23 of the Criminal Procedure Act.

Mr Gagela appears in his argument to be holding the same view. Both Mr Notyesi and Mr Gagela did not refer me to any authority which specifically dealt with the afore-quoted portion of Section 13(8).

[17] I, too, could not find case law dealing with the phrase "*where it is reasonable in the circumstances*" in the above quoted portion of Section 13(8).

Mr Notyesi and Mr Gagela seem to have been led away by the use of the word "reasonable". It seems to me that the word "reasonable" is a fluctuating term , the meaning varying with the context.

It seems to me one has to apply the primary rule of interpretation which was aptly put as follows by SCHREINER , J.A. in **JAGA v DONGES N.O**. 1950 (4) SA 653 AD at 662 ff :-

"Certainly no less important that the often repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context".

Applying the said primary rule of interpretation, it seems to me that it is more accurate to say that the phrase "*where it is reasonable in the circumstances*" refers to circumstances or situation existing on the ground or spot where the roadblock is to be conducted. One thinks of circumstances or situation where the roadblock is to be conducted, for instance where the spot is on a blind curve of a road which is such that to conduct a roadblock there would be potentially a source of danger not only to the motorists but also to the police officials conducting the roadblock. In such circumstances, I am of the view that it cannot be said it is reasonable in those circumstances to authorize that a roadblock be conducted.

Section 13(8) (a) prescribes that it be reasonable in the circumstances in order to exercise a power or perform a function referred to in Section 215 of the Constitution viz:-

(a) the prevention of crime;
(b) the investigation of any offence or alleged offence;
(c) the maintenance of law and order;
(d) the preservation of the internal security of the Republic.

[18] Applicant in his replying affidavit in response to the answering affidavit of 4th Respondent says:-

" the issuing of the certificate was not in compliance with the provisions and/or conditions prescribed in section 13(8) of the South African Police Service Act because:-

(a) the jurisdictional factors relevant to the issuing of a road block as set out in the section were not present
(b) there was no information placed before Superintendent Jinxa which objectively viewed rendered it necessary to authorize the setting up of a road block."

Nowhere in his founding affidavit and replying affidavit does Applicant disclose facts on which he bases the conclusion that there were no jurisdictional factors relevant to the issuing of a certificate authorizing the setting up of a road block.

I fully agree with Mr Gagela, such failure on Applicant's part is fatal to Applicant's case (See also **ZAMILE MAZANTSANA v MINISTER OF SAFETY & SECURITY AND OTHERS**, quoted *supra).*

[19] As stated above Mr Notyesi and Mr Gagela in interpreting the phrase " *where in the reasonable circumstances*" seem to equate the situation with the onus resting on the Magistrate when deciding to authorize the issue of a warrant for search and seizure in terms of

Section 21 to 23 of the Criminal Procedure Act 51 of 1977. I am, however, not precluded from dealing with this aspect since this is a legal issue. The Court cannot be bound by an incorrect concession by a litigant in regard to a legal issue.

See **RUDOLPH AND ANOTHER v COMMISSIONER FOR INLAND REVENUE** 1997 (4) SA 391 (SCA) at 395 D-E ; **SYFRETS PARTICIPATION BOND MANAGERS** v **COMMISSIONER SARS** 2001(2) SA 359 (SCA) at 365C-D; **MOSTERT v OLD MUTUAL LIFE ASSURANCE CO. (SA) Ltd** 2001 (4) SA 159 at 177 I-J to 178 A.

See also: **MATATIELE MUNICIPALITY & OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** 2006 (5) 47 (CC) and **MINISTER FOR JUSTICE & CONSTITUTIONAL DEVELOPMENT v MOLEKO** 2008 3 All SA 47 (SCA)

In **NOKWANDA SITHONGA v MINISTER OF SAFETY AND SECURITY AND TWO OTHERS**, Case No. A122/2006 (an unreported judgment of this Division), D. VAN ZYL, J, though dealing with Section 13(8) on another aspect, had the following to say:-

"it is clear from a reading of section 13(8) of the Act that the powers of search and seizure envisaged thereby are in addition to and outside the provision of sections 21 and 23 of the Criminal Procedure Act. As stated in paragraph [19] above, ordinarily

the powers of search and seizure are limited by the provisions of sections 21 to 23 of the Criminal Procedure Act. The requirements laid down in those sections are such that it would not be possible for a police official to perform the functions contemplated in section 13(8) of the Act. In order to primarily achieve the object of prevention of crime, subsection (8) empowers and enables police officials to conduct a search and to seize an article without first having to arrest a person, or being satisfied upon reasonable grounds that an article referred to in section 20 of the Criminal Procedure Act is in the possession or under the control of any such person. Sub-section (8) accordingly enables a police officer to perform a function he would otherwise not have been able to do without first having complied with the provisions of sections 21 to 23 of the Criminal Procedure Act".(my underlining).

I fully agree with this comment.

[20] I am mindful of the fact that the impact of Section 13(8) on the fundamental individual rights and constitutional values should be taken into consideration. Where it infringes upon or make inroads into the constitutional rights of the individual, it must be restrictively interpreted.

See : **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v R.O. COOK PROPERTIES** 2004 (2) SACR 708 SCA at 227 C-D ; **DE WET & OTHERS v WILIIERS N.O. & ANOTHER** 1953 (4) SA 124 (T); **MINISTER OF JUSTICE v DESAI N.O**. 1948 (3) SA 395 (A) 403; **MINISTER OF FINANCE v RAMOS** 1998 (4) SA 1096 (C) at 1101 E- H; **CHIDDEL THOMPSON AND HUYSON & OTHERS v MINISTER OF LAW AND ORDER & OTHERS** 1986 (2) SA .279 (W) at 282 E- F; and

POWELL NO AND OTHERS v **VAN DER MERWE AND OTHERS** (2005) 1 ALL SA 149 (SCA) at para 59.

In *casu,* however, the Applicant has failed to disclose the facts on which he bases his conclusion that there were no jurisdictional factors on the basis of which the 4th Respondent authorized the issuing of the certificate authorizing the setting up of the road block in terms of section 13(8) of the Act.

It is also my view that the averment by the Applicant that there was no information placed before the 4th Respondent which, if objectively viewed, rendered it necessary to authorize the setting up of a road block, has not been supported by facts.

In **ZANDISILE MAZANTSANA** v **MINISTER OF SAFETY & SECURITY AND OTHERS,** quoted supra **DILIZO A,J** dealing with Section 13(8) of the South African Police Service Act, 68 of 1995 but on another issue, remarked as follows:-

"…….it is clearly not sufficient for the Applicant to content herself with the mere statement of the conclusions of law without any factual or jurisdictional facts in support thereof"

I fully agree with this remark.

[21] In the result the prayer to declare the certificate issued by the 4th Respondent attached to the Respondent's Answering

Affidavit as Annexure "VN1" be declared invalid and of no force and effect and be set aside as a nullity , is bound to fail.

[22] The document issued in terms of Section 13(8) of the South African Police Service Act No. 86 of 1995, in question here, authorizes the setting up of a check point or checkpoints in order to perform the functions of prevention of crime, investigation of any offence or alleged offence, maintenance of law and order and prevention of internal security of the Republic.

In her answering affidavit on behalf of 1st Respondent, Inspector Vuyokazi Ntlantsana, states that the purpose of the roadblock was, *inter alia,* the checking of stolen motor vehicles whose engine and chassis numbers were tampered with, possession of unlinced fire-arms and prevention of crime generally. In his replying affidavit Applicant did not respond to this allegation instead he put in dispute that the 4th Respondent had power to authorize the setting up of a roadblock and also challenged the validity of the document authorizing the setting up of the roadblock.

Inspector Vuyokazi Ntlantsana further states that she examined the motor vehicle in question and observed that the chassis and engine numbers were tampered with. She also noticed that the tags of the manufacturer were removed from the motor vehicle.

In his replying affidavit Applicant denies that the motor vehicle had any irregularities. He further denies that the chassis and engine numbers were tampered with.

A document by Francois Muller was annexed to the Respondent's supporting affidavit by Inspector Siyabulela Edward Mtshengu. He states that he is employed at TOYOTA SA MOTORS as a Vehicle Identification Expert, Specific Technician and Criminal Investigator since 1986. By virtue of his position he has access to all records maintained by TOYOTA and is responsible for the uniquely identifying of motor vehicles manufactured by TOYOTA SA MOTORS. He examined the motor vehicle in question and found the following:-

(a) The Manufacturer's plate was removed from another red motor vehicle and replaced on motor vehicle in question

(b) A job tag was removed from the same red Hilux and replaced to the motor vehicle in question.
Chassis number is false.

(c) Engine number is false and has not been stamped by TOYOTA

Applicant did not respond in his answering affidavit to the findings by Francois Muller.

[23] Section 20 of the Criminal Procedure Act No.51 of 1977 provides as follows:-

"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 on 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".

[24] The findings made by the police and by Francois Muller thereafter, while examining this motor vehicle, in my view, supports a conclusion that the motor vehicle in question in this matter was an item liable to be seized as prescribed in Section 20 of the Criminal Procedure Act No. 51 of 1977. It is tainted with features which one can reasonably believe to be concerned in the commission or suspected commission of an offence and such features were found by the Police before they seized the motor vehicle.

[25] Consequently I am of the view that Applicant is not entitled to the return of the motor vehicle.

[26] As to costs I find no reason to depart from the normal rule that a successful party should be entitled to costs.

[27] In the circumstances the following order shall issue:-

The application is dismissed with costs.

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D.Z. DUKADA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:-

For Applicant	:	Mr MVUZO NOTYESI Instructed by Mvuzo Notyesi Inc.
For Respondents	:	Adv F.S. GAGELA Instructed by STATE ATTORNEY

Date Heard : 26 August 2010
Date Delivered : 27 January 2011