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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 2024/105172

HEARD: 26 SEPTEMBER 2024

DECIDED: 01 OCTOBER 2024

1) REPORTABLE: NO

2) OF INTEREST TO OTHER JUDGES: NO

3) REVISED.

DATE 01 OCTOBER 2024

SIGNATURE

In the matter between:

ANDISIWE NOMFUNDO MTAKATI

Applicant

And

MINISTER OF POLICE, SOUTH AFRICA

First Respondent

**STATION COMMANDER, BOSCHKOP
POLICE STATION**

Second Respondent

Summary: Search and seizure without a warrant; Provisions of Section 22 of the Criminal Procedure Act implicated; Requirements to succeed on the common law remedy of spoliation; deprivation is not unlawful where conduct aligns with the provisions of Sec 22.

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 01 October 2024

ORDER

1. Condonation is granted to the respondents for the late filing of their answering affidavit.
 2. The application is dismissed.
 3. Each party must pay its own costs.
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JUDGMENT

BAM J

Introduction

1. The applicant filed an urgent motion for interim relief, in which she sought, pending finalisation of the application, *inter alia*, an order for the immediate return of her motor vehicle, a VW Polo, (more fully described in this judgment) which was allegedly unlawfully seized and impounded by the respondents, along with a restraining order to interdict and restrain the respondents and anyone 'acting in cohorts with the respondents' from further impounding her vehicle. The respondents are opposing the relief. They seek condonation for the late filing of their answering affidavit.

Background

2. The common cause facts point to the following: On 29 January 2024, at Mabovula Street, in Ngangelizwe, Mthatha, Eastern Cape, the crimes of murder and kidnapping were committed, using a vehicle described as a Polo 1.4 Comfortline, with registration letters and numbers J[...] 8[...] F[...] G[], (the applicant's vehicle or the vehicle). The victim is described by the

respondents as K[...] M[...] N[...]. Shortly thereafter, on 9 February, two suspects named as, Lungile Njozela and Baninzi Sabi, were arrested and charged with the unlawful and intentional kidnapping of the victim under case number 23/02/2024, opened on 23 February 2024.

3. At the time of the arrest, the suspects were not in possession of the vehicle. Police in Ngangelizwe Police station, with a view to securing the car as evidence of the commission of the crime of kidnapping, reported the vehicle as wanted via the police circulation system which circulates across police stations throughout the country. On 13 September 2024 at about 08h00, the vehicle, then driven by the applicant, an accountant, who works and resides in the Pretoria East area, was stopped at during a 'stop and search' point in the area of Boschkop, Pretoria East, by members of Echo1 Security Company and the South African Police Service, CSC¹. The applicant was escorted to the Boschkop police station where she met Captain Smit, (Smit). After checking the LPR² camera footage, the SAPS circulation system and speaking to the investigating officer, Smit informed the applicant that the vehicle is wanted in connection with the crimes of murder and kidnapping in Mthatha. Smit directed that the vehicle be impounded.

Condonation

4. The applicant's papers were issued on 16 September 2024, at 15h20. It was indicated in the Notice of Motion that the matter would be heard at 14h00 on 17 September. The respondents were required to file their notice of opposition, if any, on the 16 September, at 15h00 while their answering papers had to be filed by no later than 10h00 on the 17 September. Service upon the respondents was effected only at 10h00 on 17 September. All of this

¹ The unit's name is not written in full. It may be the SAPS Community Service Centre, but nothing turns on the name in so far as the record suggests.

² LPR refers to License plate recognition camera, a type of security camera that is designed to capture a vehicle's licence plate.

meant that the respondents would not have sufficient time to file their papers. It is in the interests of justice that the respondents be granted condonation³.

Applicant's submissions

5. The applicant avers in her founding affidavit that she is the owner of the vehicle. She was in peaceful and undisturbed possession until the respondents wrongfully and unlawfully deprived her possession of the vehicle. She then canvasses the requirements for a final interdict. Here the applicant reaffirms that she has a clear right not to be deprived unlawfully of her property. In relation to the harm or the reasonable apprehension thereof, the applicant avers that she cannot get to work and transport her child to school without the car. She fears she may be in breach of her employment contract as she has already missed work due to her vehicle being impounded. She submits that the balance of convenience favours her while the respondents will not suffer any harm in the event they are ordered to return her vehicle. She concludes she has no alternative remedy. In her heads of argument, the applicant confines her submissions to only two points. These are: (i) she was in peaceful possession and (ii) she was unlawfully deprived of her vehicle.

Respondents' submissions

6. The respondents submit that the application is not urgent. The vehicle was lawfully seized and impounded because it was used as an instrument to commit the crimes of murder and kidnapping. The respondents submit that it is not legally competent for this court to grant the relief sought by the applicant. That it is only the criminal court that can lawfully decide whether to release the vehicle to the applicant or to the state, upon completion of the criminal proceedings. As the vehicle was used as an instrument to commit the crimes in question, the police were enjoined to impound the vehicle, submit the respondents. On the question of the warrantless search and seizure, the respondents point to the provisions of Section 22 of the Criminal Procedure

³ *Turnbull-Jackson v Hibiscus Coast Municipality and Others* [2014] ZACC 24, paragraph 24; *Nair v Telkom SOC Ltd and Others* (JR59/2020) [2021] ZALCJHB 449 (7 December 2021), paragraph 11.

Act and state that they believed, on reasonable grounds, that had they applied for the warrant in the circumstances, it would have been issued, as provided for in Sec 21 (1)(a) of the CPA; and that the delay in applying for the warrant would have defeated the object of the search. Finally the respondents submit that the applicant's charge that the vehicle was unlawfully seized is not sustainable, given the circumstances of this case.

Issues

7. The issues are whether:

- (i) the application is urgent;
- (ii) the search and seizure of the applicant's vehicle was unlawful;
- (iii) the applicant was indeed spoliated; and
- (iv) costs

Legal framework

8. Section 20 of the CPA provides that the State may, in accordance with the provisions of this Chapter, seize anything (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...;
- b) which may afford evidence of the commission or suspected commission of an offence;
- 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.

9. Section 21: Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued a) by a magistrate or justice... b) or by a judge or judicial officer presiding at criminal proceedings...

10. Section 22: A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20:

- a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search .. consents to such search and the seizure of the article in question; or
 - b) If he on reasonable grounds believes-
 - (i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and
 - (ii) that the delay in obtaining such warrant would defeat the object of the search.
11. Accordingly, the default position is that a warrant is required to search and seize. A warrantless search and seizure of incriminating articles will be unlawful for failure to comply with Sec 21 of the CPA unless it is justified under Sec 22, either by consent in terms of s 22(a) or compliance with the requirements of s 22(b)⁴.
12. The Bill of Rights, in Sec 14 guarantees the right to privacy in these terms:
‘Everyone has the right to privacy, which includes the right not to have—
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed. ‘
13. A discussion therefore, on the legality or otherwise of a search and seizure, without weaving into it the right to privacy enshrined in the Constitution would be incomplete and wanting. This case is concerned with a warrantless search and seizure of the applicant’s vehicle. Our courts have said that a warrant ‘is not a mere formality. It is the method tried and tested in our criminal procedure to defend the individual against the power of the state,

⁴ *S v Murphy and Others - Search and Seizure* (CC27/2018) [2023] ZAWCHC 184; 2024 (1) SACR 138 (WCC) (12 July 2023).

ensuring that police cannot invade private homes and businesses upon a whim, or to terrorise.’⁵

14. A warrant ‘governs the time, place and scope of the search. This softens the intrusion on the right to privacy, guides the conduct of the inspection, and informs the individual of the legality and limits of the search. Our history provides evidence of the need to adhere strictly to the warrant requirement unless there are clear and justifiable reasons for deviation’⁶.

15. The right to privacy flows from the value placed on human dignity⁷. Courts have said that privacy is acknowledged ‘in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.’⁸ But, it does not mean that the right to privacy relates ‘solely to the individual within his or her intimate space. Thus, when people are in their offices, cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied’⁹.

16. But the law recognises that there may be instances where the need of the state to protect public interest and effective policing compel an exception to the requirement of a warrant, such as provided for in Section 22 of the CPA, *Gaertner*¹⁰, *Mogajane*¹¹, *Kunjana*¹². The constitutionally sound

⁵ *Magajane v Chairperson, North West Gambling Board* (CCT49/05) [2006] ZACC 8; 2006 (10) BCLR 1133 (CC) ; 2006 (5) SA 250 ; 2006 (2) SACR 447 (8 June 2006), paragraph 74.

⁶ *Gaertner and Others v Minister of Finance and Others* (CCT 56/13) [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) (14 November 2013), paragraph 69.

⁷ *Minister of Police and Others v Kunjana* (CCT253/15) [2016] ZACC 21; 2016 (9) BCLR 1237 (CC); 2016 (2) SACR 473 (CC) (27 July 2016), paragraph 14.

⁸ *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996) paragraph 67.

⁹ *Directorate of Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) (25 August 2000), paragraph 16.

¹⁰ Note 6 *supra*, paragraph 70.

¹¹ Note 5 *supra*, paragraph 75.

¹² Note 7 *supra*, paragraph 40.

exception provided for in Sec 22 of the CPA¹³ provides no free pass to anyone, including the state. Thus, the need to scrutinise the conduct and the reasons rests with the court as encapsulated in this dicta from *Ngqukumba v Minister of Safety and Security and Others*:

'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 unlawful. This unlawfulness, plus the other requirement for a spoliation order (namely, having been in possession immediately prior to being despoiled) satisfy the requisites for the order. All that the despoiled person need prove is that:

- (a) she was in possession of the object; and
- (b) she was deprived of possession unlawfully.'¹⁴

17. What this means is that the court evaluating the reasons advanced for the deviation from the requirement of the warrant and the police's belief, premised on Sec 22, must be satisfied that the reasons are sound and the belief objectively reasonable¹⁵.

Discussion

Urgency

18. Urgent motions are governed by Rule 6 (12) of the Uniform Rules. The applicant avers that she uses her vehicle to travel to and from work and relies on the same vehicle to drop off and collect her minor child from school. She

¹³ *Nkunjana* paragraph 40.

¹⁴ [2014] ZACC 14, paragraph 13.

¹⁵ *S v Murphy*, note 4 *supra*, paragraph 18.

has no other means to move around. She now has to rely on public transport, in circumstances where she has no budget for public transport. Were she to apply for a date in the ordinary motion roll, she will in most likely be allocated a date sometime in early 2025. I am satisfied that the applicant will not be afforded substantial redress in a hearing in due course.

Whether the search and seizure of the applicant's vehicle was unlawful

19. The respondents in this case assert that they acted in line with provisions of Sec 22 of the CPA. To substantiate their case, the respondents submit that it is not in dispute that on 29 January 2024, in Ngangelizwe, the crimes of kidnapping and murder were committed and that the vehicle in question was used in the commission of the offences. Two suspects have since been arrested and are facing charges of kidnapping. As of February 2024, the police in Ngangelizwe, in a bid to recover the vehicle in question, registered it in the police circulation system as a wanted vehicle. The applicant herself does not dispute that the vehicle was used in the commission of the offence of kidnapping but highlights that she did not commit the crime¹⁶.

20. The respondents referred the court to: (i) a copy of the docket which bears the case number under which the two suspects were charged; (ii) the warning statements, informing the individual suspects of their rights, bearing the suspects' names in each of the statements, the case number, the name of the victim, and the name of the Investigating Officer (the rights' notices); (iii) a copy of the record registering the vehicle in the police circulation system depicting the case number, and an image featuring the back of the vehicle with its registration letters and numbers. This record carries the warning that the occupants of the vehicle were involved in the commission of the crimes of murder and kidnapping at Ngangelizwe, that in the event the vehicle is spotted, the investigating officer must be contacted for further action.

¹⁶ Caselines 16-4 paragraph 5 'Ad paragraphs 3.1-3.6: The contents of these paragraph are not denied, in so far as they do not relate to me, however to my vehicle.'

21. The respondents further provided what appears to be an extract from video footage depicting the vehicle recorded as at 07h16 on the morning of 13 September 2024; (iv) Finally, the respondents attached the sworn statements of the Investigating Officer and Captain Smit confirming the version placed by the deponent before court.
22. The circumstances of this case must be contrasted against those in *Ngqukumba*¹⁷, on which the applicant relies, where the court was concerned with the interpretation of Sections 68(6)(b) read with section 89(1)¹⁸ of the National Road Traffic Act¹⁹. In that case, a suspect, who was under police investigation in connection with a stolen vehicle, volunteered information to the effect that he had been involved in the theft of another vehicle. Following on the information, the suspect took the police to where the vehicle was found. There, the police ordered the appellant to drive the vehicle to the police station. Upon noticing that its chassis and engine numbers had been filed away, the vehicle was impounded. In all of this, the police acted without a warrant.
23. The court in *Ngqukumba* reasoned that the appellant had been spoliated and ordered that the police release the vehicle to him. Underlying the court's reasoning was that there may be perfectly legitimate reasons why a person may be in possession of a vehicle with a defiled engine and chassis number. Here, Madlanga J, writing for the court, explains the court's reasoning:

'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

¹⁷ Note 13.

¹⁸ The sections read together prohibit possession "without lawful cause" of a motor vehicle of which the engine or chassis number has been falsified or mutilated.

¹⁹ Act 93 of 1996.

objects of that nature, then the mandament van spolie might well not be available.’²⁰

24. In the present case, the applicant herself accepts that she is in possession of a vehicle that was used as an instrument in the commission of the crime. This detail affirms the IO’s statements that the applicant refused to cooperate with the police even though she knew that her vehicle was involved in the commission of the offence.

25. One is not concerned with the provisions of the Traffic Act and possession of a vehicle with defiled engine and chassis numbers but crimes of murder and kidnapping where the same vehicle was involved and where the applicant accepts that her vehicle was used to commit the crime of kidnapping. These details to me point to one conclusion only, they justify the urgency with which the respondents moved after the vehicle’s registration plate was captured by the cameras and ground their belief in their compliance with Sec 22 of the CPA. These reasons are sound and the respondents’ belief in my view, objectively viewed, is sound. There is thus no question of unlawfulness in the search and seizure of the applicant’s vehicle. The vehicle was lawfully searched and seized.

26. The respondents submit that, whilst criminal proceedings are pending, it is not competent of this court to make any order regarding the vehicle. Indeed, it has not been disputed that the proceedings are currently pending. In this regard, the court in *Tshatshu v Minister of Safety and Security and Another*, in the course of entertaining a case for damages caused to a vehicle that had allegedly been unlawfully seized, had the following to say:

‘The concession by the plaintiff that the vehicle was lawfully seized by the police was therefore correctly made. For as long as the criminal

²⁰ Note 13 *supra*, paragraph 15.

proceedings are still in progress this court has no jurisdiction to make an order relating to that vehicle.’²¹

Whether the applicant was indeed spoliated

27. To succeed with the relief of spoliation, the applicant has to establish that: (a) she was in possession of the object; and
(b) she was deprived of possession unlawfully²².

28. I have already found that the applicant’s vehicle was lawfully seized. Under the circumstances, the applicant’s case of spoliation fails. Finally, the applicant rely on *Ziboti and Another v Minister of Police and Others*²³, a case concerned with the unlawful personal search and the search of the applicant’s home and seizure of personal items, by members of Correctional Services, without a warrant, based on an intelligence report. A female friend found in the applicant’s home was also searched. There, the court upheld the applicant’s spoliation claim. *Ziboti* is plainly distinguishable from the present case.

Costs

29. The general principle is that costs are a matter within the discretion of the court, which discretion must be exercised judiciously. In all circumstances, the question is whether it would be just and equitable to make a particular costs order²⁴. On reflecting on the circumstances of this case, the applicant clearly sought to vindicate a constitutionally discernible right. This triggers the responsibility on this court to consider whether the *Biowatch*²⁵ principle is applicable. The primary consideration when enquiring into the circumstances of a case, according to the *Biowatch* principle is whether the award of costs in

²¹ (433/2018) [2022] ZAECHC 17 (13 June 2022), paragraph 15.

²² Note 13.

²³ (3286/2024) [2024] ZAECHC 58 (19 September 2024).

²⁴ *Helen Suzman Foundation v Speaker of the National Assembly and Others* (32858/2020) [2020] ZAGPPHC 574 (5 October 2020), paragraphs 110-112.

²⁵ *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009).

a particular case would hinder or promote the advancement of Constitutional justice.

30. In this case, the applicant, whether correctly or incorrectly, sought to vindicate her rights against being searched and her article seized in circumstances where the police had no warrant authorising such search, albeit, the respondents were acting lawfully and within the confines of the CPA. I am persuaded that it would send a wrong message to members of the public faced with the same situation were this court to mulct the applicant in costs and would ultimately hinder the advancement of constitutional justice. Accordingly, no costs will be awarded to the victorious respondents.

Order

1. Condonation is granted to the respondents for their late filing of the answering affidavit.
2. The applicant's case is dismissed.
3. Each party must pay its own costs.

NN BAM
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Date of Hearing: 26 September 2024

Date of Judgment: 1 October 2024

Appearances:

Counsel for the Applicant: Mr T Noah (Attorney with right of appearance)
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Counsel for the Respondents:

Adv K Mondlane

Instructed by:

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