



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 13412/24

In the matter between:

FSA TRANSPORT (PTY) LTD

Applicant

And

THE STATION COMMANDER
CAPE TOWN CENTRAL VEHICLE
CRIME INVESTIGATION UNIT
SOUTH AFRICAN POLICE SERVICES

First Respondent

THE MINISTER OF POLICE

Second Respondent

Judgment: 26 September 2024

Le Grange, ADJP:

[1] In this matter the Applicant seeks an enforcement order, on an urgent basis, in terms of section 18 of the Superior Courts Act 10 of 2013¹, whereby the operation and

¹ The relevant parts of Section 18 for purposes of this reads as follows:
'Suspension of decision pending appeal

execution of the judgment and order granted by the Court on 18 June 2024, not be suspended pending the outcome of a petition by Second Respondent (“the Police”) to the Supreme Court of Appeal, including the outcome of such appeal in the event such leave being granted.

[2] Leave was also sought by the Applicant to file a further affidavit. The Police did not object to the filing thereof, as the further affidavit simply showed that a delay was caused in serving the petition on the Registrar of the Supreme Court of Appeal.

[3] It is now well established in our law that the granting of relief as envisaged in s 18 (3) constitutes an extra ordinary deviation from the standard practice that a judgment and its attendant order (s) are suspended pending an appeal. An Applicant is therefore required, apart from the requirement of exceptional circumstances as envisaged in sections 18(1) and 18(3), to prove on a balance of probabilities that he/she will suffer irreparable harm if the order is not made. Furthermore, the other party will not suffer irreparable harm if the order is made. Moreover, a relevant consideration in granting the exceptional relief is the prospects of success on appeal².

[4] The factual matrix of the main application can be summarized as follows: The Applicant is in the transport business and the owner of a 10 wheeler truck. On 12 January 2024 the truck was in a collision. In March 2024, the Applicant caused the

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

.....

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1) –

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.’

² UFS v Afriforum 2018 (3) SA 428 SCA at paras 10-15.

truck to be re-sprayed and fitted it with a new engine and cab. According to the director of the Applicant, in the process of restoring the truck, he foolishly requested the panel beater to remove the Vin number plate of the truck as he was unaware it was a criminal offence.³

[5] The truck in the meantime was sold to a logistics company which is the Second Applicant. In May 2024, a representative of the Applicant was sent to the Police to obtain a clearance certificate in respect of the new engine and to transfer the truck in the name of its new owner. The Police then seized the truck on the following basis: (i) that the engine and or chassis numbers have been tampered with in contravention of s 68(6)(a) of the National Road Traffic Act 93; (ii) there is a suspicion that the vehicle was stolen and that charges of theft and possession of suspected stolen property will be investigated and; (iii) the seizure was done in accordance with section 20, 21 and 22 of the Criminal Procedure Act, Act 51 of 1977 and will stay in the safekeeping of the South African Police Service in terms of the Act.

[6] The Police's version of events is somewhat different. According to the police, the undercarriage or chassis rail of a truck must have the same unique stamped or VIN number as the cab of a truck. The cab is where the driver of the truck sits. The Police in this instance recorded in their papers that on 8 May 2024 the Applicant attended their premises or yard to obtain a police clearance certificate for the truck. When it was inspected the Vin number plate of the cab and chassis rail differed. According to the Police, the Applicant's representative explained that it was a new cab and they have a purchase receipt for it. The truck was released and the Applicant had to return with the receipt to verify it was legitimately purchased.

³ S 68 (2) of the National Road Traffic Act, 93 of 1966 provides that “ No person shall- (a) falsify or counterfeit or, with intent to deceive, replace, alter, deface or mutilate or add anything to a registration number or a registration mark or a similar number or mark issued by a competent authority outside the Republic” and s 89 (1) provides that ‘Any person who contravenes or fails to comply with any provision of this Act or with any direction, condition, demand, determination, requirement, term or request thereunder, shall be guilty of an offence.’

[7] The Applicant returned with the truck on 23 May 2024 for a fresh clearance certificate. Instead of bringing a receipt to show the new cab was legitimately purchased, the Applicant replaced the VIN number on the new cab by using the number of the old cab, which according to the police is a crime.

[8] Due to the different versions as to how the Vin number plates appeared on the cab, the Applicant was charged with a number of criminal charges. The police docket was taken to the senior public prosecutor in Bellville who declined to prosecute the Applicant for perjury and instructed that the truck be returned to the Applicant.

[9] In the process of releasing the truck, a senior official of the police intervened and refused to release the truck. According to the senior police official, the Applicant committed a serious crime that needs further investigation.

[10] Aggrieved by what the Applicant perceived as an unlawful seizure of the truck, it approached this court on an urgent basis seeking a *rule nisi*, calling on the Police to show cause why the truck should not be returned. Paragraphs 2.2 to 3 of the rule nisi were styled as follows:

“2.2 Declaring the First Respondent’s continued possession of the Truck invalid and unconstitutional.

2.3 Directing the First Respondent to issue a South African Police Clearance certificate in respect of the Truck to the First Applicant.

2.4 That the First Respondent is interdicted and restrained from, inter alia:

2.4.1 Destroying, compacting, shredding and or causing damage to the Truck.

3. *That the relief set out in paragraphs 2.4 and 2.4.1 (“the interim relief”) shall operate as an interim interdict with immediate effect, pending the final determination of this application.”*

[11] On 18 June 2024, this Court granted an order, *inter alia*, ordering the Police to immediately release the truck and to issue a clearance certificate, despite the fact that the Applicants only sought interim relief pending the final determination of the application. The Police immediately lodged an application for leave to appeal as they were of the view that the order of this Court was final in effect, which the Applicants were not entitled to. More importantly, according to the Police, the immediate release of the truck would be inconsistent with the National Road Regulations⁴ which provides that:

- (i) *It is illegal for the applicants to operate a motor vehicle without a roadworthy certificate.*⁵
- (ii) *If the VIN number has been tampered with, a roadworthy certificate may not be issued without a police clearance certificate.*⁶
- (iii) *For a police clearance certificate to be issued, the police must be satisfied that:*⁷ *The vehicle is fitted with microdots; And, if necessary, refer the matter to the South African Service Vehicle Identification Section. The police then investigate if the truck is stolen or not.*

[12] Leave to appeal was refused and the Police thereafter petitioned the Supreme Court of Appeal for leave to appeal and it is that petition that is currently pending.

[13] The question now is whether exceptional circumstances as envisaged in

⁴ GNR. 225 of 17 March 2000

⁵ Section 42 of the Act.

⁶ Regulation 141(3)(a).

⁷ Regulation 337B(4).

sections 18(1) and 18(3) exist to grant the exceptional relief and what the prospects of success will be on appeal.

[14] Mr. Holland who appeared for the Applicant argued that the decision in Nggukumba v Minister of Safety & Security and Others⁸ finds application in this instance as the police acted unlawfully by seizing the truck that was in peaceful possession of the Applicant without a search warrant. Furthermore, a proper case for a spoliation order was advanced in the founding papers and the application for leave to appeal by the Police was simply filed to harass the Applicant as no criminal charges are pending against them.

[15] Mr. Anton Katzs, SC assisted by Mr. B Prinsloo contended that: firstly, the Applicant failed to advance any facts to show the Police acted unlawfully when the truck was seized in its founding papers. Secondly, the court erred in granting final relief when the Applicants only sought interim relief and impermissibly stepped into the shoes of the Police, by ordering that a clearance certificate be issued without any evidence, or submissions by counsel whether the prerequisites for such a clearance were satisfied. And lastly, the Applicants failed to demonstrate on a balance of probabilities that they will suffer irreparable harm if the order for execution is not granted. For the former proposition reliance was also placed on the Nggukumba judgment.

[16] In that matter the facts were the following: On 10 February 2010 a suspect who was under investigation by the Police in connection with a stolen vehicle volunteered unrelated information. The information was that he had previously been involved in the theft of another vehicle. He told the police that this vehicle was at a certain taxi rank in Mthatha. The Police took him there. He pointed out the vehicle to them. The vehicle belonged to the applicant. The Police instructed the applicant's driver to take the vehicle to a Police station. There they discovered that its chassis number had been tampered with and appeared to have been removed from another vehicle and placed in the applicant's vehicle; there was no engine number as the original engine number had

⁸ 2014 (5) SA 112 CC

been ground off; and the manufacturer's tag plate had been removed from another vehicle and placed on the applicant's vehicle. The Police retained the vehicle. During all this the Police were without a search and seizure warrant. The applicant subsequently instituted proceedings in the High Court for the return of the vehicle. The cause of action was the *mandament van spolie*. A remedy aimed at reversing unlawful deprivation of possession, also known as a spoliation order.

[17] Both, the High Court and Supreme Court of appeal proceeded from the premise that a tampered vehicle is no different from an article the possession of which would be unlawful under all circumstances and that s 68 (6)(b) and 89(1) of the Traffic Act ousts the spoliation remedy. The Constitutional Court clarified the position and held at para 13 that:

"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

[18] To sum up. An individual can possess a tampered vehicle if there is lawful cause for such possession and sections 68 (6)(b) and 89(1) of the Traffic Act do not oust the

spoliation remedy.

[19] In applying the above stated principles, the question now is whether exceptional circumstances exist and what the prospects of success on appeal will be. Firstly, the factual matrix in this instance, differ from that of Nggukumba. In the latter, the Police only appealed against the prohibition of possession of a tampered vehicle ‘without lawful cause’⁹ and not against the declaratory order by the court that the seizure was unlawful.

[20] In this instance the real issue is not the possession of a tampered vehicle without lawful cause but whether the Police acted unlawfully when the truck was seized. That issue is very much alive between the parties in the pending petition, unlike in Nggukuma.

[21] On a conspectus of all facts in this matter, I am not persuaded that the Applicant has shown exceptional circumstances that warrants the granting of the relief sought pending the outcome of the petition. In any event, Counsel for the Police placed on record in the event the petition fails then the vehicle will immediately be returned to the Applicant. Furthermore, the issue of granting final relief when only a rule nisi was sought is also a relevant point to be considered on petition.

[22] In any event, even if I am wrong, an order in favour of the Applicant will be of little comfort as the Police will be entitled in terms of s 18 (4) to an automatic appeal to a full court and such order pending the outcome of that appeal will automatically be suspended.

[23] For all these stated reasons, it follows the Applicant’s application cannot succeed.

[24] In the result the following order is made:

⁹ S 68 (6)(b) of the Traffic Act.

The application is dismissed. With regard to costs. Since there is a pending petition, I am of the view that costs should stand over for later determination.

LE GRANGE, ADJP