THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 660/12

Reportable

In the matter between:

ANELE NGQUKUMBA **APPELLANT**

and

MINISTER OF SAFETY & SECURITY **FIRST RESPONDENT**

THE STATION COMMISSIONER, MTHATHA CENTRAL POLICE STATION **SECOND RESPONDENT**

COMMANDING OFFICER – VEHICLE SAFE GUARD UNIT – GROUP 46, MTHATHA **THIRD RESPONDENT**

Neutral citation: *Ngqukumba v Minister of Safety & Security* (660/12) [2013] ZASCA 89 (31 May 2013).

Coram: **Brand, Maya, Theron and Petse JJA and Meyer AJA**

Heard: **16 May 2013**

Delivered: **31 May 2013**

Summary: **Search and seizure – seizure of motor vehicle by police in terms of ss 20 and 22 of the Criminal Procedure Act 51 of 1977 despite being unlawful not entitling person dispossessed to restoration if possession would be without lawful cause as contemplated in s 68(6)(*b*) of the National Road Traffic Act 93 of 1996. Costs – substantial success – appellant not achieving substantial success warranting a favourable costs order.**

ORDER

On appeal from: Eastern Cape High Court, Mthatha (Pakade ADJP sitting as court of first instance):

The appeal is dismissed with costs such costs to include the costs of two counsel.

JUDGMENT

PETSE JA (Brand, Maya, Theron JJA and Meyer AJA concurring):

[1] More than a century ago, Innes CJ stated in *Nino Bonino v De Lange*[1] that:

'It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute.'

[2] The issue that confronted the learned Chief Justice in *Nino Benino* arises in this appeal although it has another dimension to it. It concerns the question as to whether the declaration of unlawfulness of the seizure of the appellant's motor vehicle by the police ─ acting under ss 20 and 22 of the Criminal Procedure Act 51 of 1977 (CPA) ─ entitled the appellant to the summary restoration of his vehicle when his consequent possession of the vehicle would have been without lawful cause ─ and thus an offence ─ as contemplated in s 68(6)(*b*) of the National Road Traffic Act 93 of 1996 (the Act). The Eastern Cape High Court, Mthatha (Pakade ADJP) held that the appellant was not entitled to restoration.

[1] *Nino Bonino v De Lange* 1906 TS 120 at 122.

[3] Accordingly the high court, whilst declaring the seizure unlawful and setting it aside nonetheless did not order restoration to the appellant. Instead it authorised the police to retain the vehicle in their possession subject to the appellant complying with the provisions of the Act. It also ordered each party to pay its own costs. It subsequently granted the appellant leave to appeal to this court.

[4] The issue for determination arises against the following backdrop. The appellant, Mr Anele Ngqukumba, is a taxi operator in the district of Mthatha, Eastern Cape Province. During February 2010 Ngqukumba's motor vehicle, a Toyota Hi-Ace parked at the Golden Egg Taxi Rank, Mthatha, whilst in the possession of his employee, was seized by members of the South African Police Service, who suspected it to have been stolen. Convinced that the police had no lawful basis to seize the motor vehicle in the first place, Ngqukumba applied to the high court for an order, inter alia, declaring the search, seizure and continued detention of his motor vehicle unlawful and for the restoration of its possession to him.

[5] The respondents resisted the grant of the relief sought by the appellant on several grounds. They asserted that the police inspection of the motor vehicle revealed that: (a) its chassis plate had been tampered with and appeared to have been removed from another motor vehicle and superimposed on the appellant's motor vehicle; (b) the vehicle's original engine number had been ground off; and (c) the manufacturer's tag plate appeared to have been removed from another motor vehicle and later superimposed on the appellant's motor vehicle. The consequence of these discoveries, so asserted the respondents, was that no one may lawfully possess the motor vehicle. In his replying affidavit, Ngqukumba disputed that the police inspection of his motor vehicle yielded the outcome claimed by the respondents.

[6] There was a dispute of fact in relation to the question whether the appellant's motor vehicle's engine and chassis numbers had been tampered with. But, these being motion proceedings, this dispute must be determined on the basis of the *Plascon-Evans* [2] principle. And there was no suggestion that the respondents' version is far-fetched or otherwise untenable.

[7] As I have said, the high court found that the seizure of the motor vehicle was unlawful. The respondents have not appealed against this finding. Despite this finding the high court nonetheless declined to order the release of the motor vehicle to the appellant. It considered that the provisions of ss 68(6)(*b*) and 89(3) of the Act precluded it from doing so. It relied on judgments[3] of this court, which it correctly recognised as binding on it, in reaching that conclusion. Accordingly, the central issue on appeal is whether it should have ordered restoration of the motor vehicle to the appellant.

[8] There is a steadily growing body of case law[4] in which the import of ss 68(6)(*b*) and 89(3) of the Act is explained. In *Pakule* and *Tafeni*[5] this court said the following (para 26):

'On the assumption, however, that there were no grounds for a reasonable belief that the vehicles were concerned in the commission of an offence (that is, that there was no compliance with s 20) [of the CPA], we see no reason why, when the vehicle is in the possession of the police, and they ascertain that there are indeed such grounds for a reasonable belief that the item is concerned in the commission of an offence — such as the tampering with engine and chassis numbers — they should then not seize the

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[2] See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-I, where it was stated that where factual disputes in motion proceedings arise, relief may only be granted if the facts averred in the applicant's affidavit that have been admitted by the respondent, together with the facts alleged by the respondent, justify the order sought; *President of the Republic of South Africa & others v M & G Media Ltd* 2011 (2) SA 1 (SCA) paras 13-14.

[3] *Marvanic Development (Pty) Ltd & another v Minister of Safety & Security & another* 2007 (3) SA 159 (SCA); *Pakule v Minister of Safety & Security & another; Tafeni v Minister of Safety & Security & another* 2011 (2) SACR 358 (SCA).

[4] Id. See also: *Basie Motors BK t/a Boulevard Motors v Minister of Safety & Security* (SCA case no 135/2005; [2006] ZASCA 35; 28 March 2006); *Absa Bank Ltd & Another v Eksteen* (SCA case no 81/2010; [2011] ZASCA 40; 29 March 2011).

[5] Footnote 3.

vehicle lawfully. If that were not so, and they returned the vehicles to the alleged owners, they would be acting in contravention of the National Road Traffic Act. The police cannot lawfully release the vehicle to the owner or possessor: an order by a court that a vehicle be returned would defeat the provisions of the latter Act.'

[9] Section 68(6)*(b)* of the Act provides:

'(6) No person shall–

. . .

(b) 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.'

Section 89(3) of the Act in turn provides that a contravention of s 68(6)*(b)* constitutes an offence for which the accused is, on conviction, liable to a fine or imprisonment for a period not exceeding three years.

[10] There is also the judgment of this court in *Marvanic*.[6] There the appellants had sought the return of two motor vehicles that had been seized by the police on the ground that they had been stolen. The appellants' case was founded on s 31(1)(*a*) of the CPA following the withdrawal of the charges of fraud and possession of stolen property laid against the appellants. The claim was unsuccessful because this court found that s 68(6)*(b)* of the Act precluded possession of motor vehicles whose registration and chassis numbers had been tampered with. Lewis JA writing for the majority stated (para 8):

'[I]t seems to me that the purpose of s 68 is to prevent people, including owners of vehicles, being in possession of, and driving, vehicles that have been tampered with in the ways detailed in the section. The section makes possession that might otherwise be lawful unlawful. At the time when the vehicles were seized, their possession was thus "without lawful cause" even if the appellants were also the owners. The fact that the vehicles are seized does not mean that their return would make their possession lawful.'

[6] Footnote 3.

[11] This theme was taken further in *Basie Motors BK t/a Boulevard Motors v Minister of Safety & Security*[7] in which Mpati DP stated (para 16):

'[P]ossession of a vehicle where there has been tampering with its engine or chassis number is forbidden: *the National Road Traffic Act does not confer authority on anyone to allow it*.' (My emphasis.)

There is yet another judgment of this court in *Absa Bank & another v Eksteen*[8] in which it was held that where a purchaser shows that the eviction (in breach of the warranty against eviction) is unassailable the fact that the purchaser might later acquire the right to possession is immaterial. There the motor vehicle that the respondent had purchased from the appellant revealed evidence that its original identification numbers had been tampered with. Accordingly, this court held that on 'the authority of *Marvanic* the series of purchasers were indeed not capable of resisting the eviction.'

[12] Unsurprisingly, counsel for the respondents relied on this line of cases in support of the judgment of the court a quo. Counsel for the appellant, on the other hand, placed much store in the judgment of this court in *Ivanov v North West Gambling Board*.[9] But on reflection I am convinced that the decision in *Ivanov* is wrong in so far as it held that the appellant in that case was entitled to unqualified restoration of possession of his spoliated gambling machines, even though his possession thereof constituted a contravention of the provisions of s 9(1) of the National Gambling Act 7 of 2004 and a criminal offence under s 82 of that Act.

[13] It is trite that the mandament van spolie has only two requirements: peaceful and undisturbed possession of property and the unlawful deprivation of such possession. It is also trite that the spoliated person must be restored to his or her former position before competing claims to title or to possession are considered and that in consequence lawful title to possession is not a

[7] Footnote 4.
[8] *Absa Bank Ltd & another v Eksteen* (SCA case no 81/2010; [2011] ZASCA 40; 29 March 2011 para 12).
[9] *Ivanov v North West Gambling Board* 2012 (6) SA 67 (SCA) paras 18-19.

requirement for sucess. The rule that goods dispossessed against the will of the possessor must be restored forthwith, however, is not an absolute one. A legally admissible defence that might be raised against an application for a mandament van spolie is the one that was raised in *Ivanov* and also in the present matter, which is that restoration of possession is not possible[10] because the possession thereof by the spoliated person would not only be unlawful but would in fact constitute a criminal offence.

[14] It is not the requirements of the mandament van spolie that were in issue in *Ivanov*, nor are they any longer in issue in this appeal. There are also no competing claims to possession of the vehicle in question by the respondents. The provisions of s 68(6)(*b*) of the Act prohibit the appellant from being in possession of the vehicle which he might otherwise lawfully possess. In terms of s 89(3) of that Act, contravention of s 68(6) amounts to a criminal offence rendering an accused liable on conviction to a fine or imprisonment not exceeding a period of three years. As was said by Mpati DP in *Basie Motors*[11]

'… possession of a vehicle where there has been tampering with its engine or chassis number is forbidden: the National Road Traffic Act does not confer authority on anyone to allow it.'

and, I venture to add, least of all the courts of this country.

[15] The appellant's possession of the vehicle for now - until such time as a police clearance is issued and the vehicle is registered in accordance with the provisions of the Act - will thus be unlawful according to the criminal law.[12] The police cannot lawfully release the vehicle to the appellant, whether he is the owner or erstwhile lawful possessor thereof. An order by a court that it be done will be no different than ordering a person to be restored in the possession of his or her heroin or machine gun which he or she may not lawfully possess. In fact, when counsel for the appellant was invited in argument to distinguish this case

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[10] CG van der Merwe *Sakereg* 2de Uitgawe (1989) 133-137.
[11] Footnote 4 para 16.
[12] *Minister van Wet en Orde v Erasmus & 'n ander* 1992 (3) SA 819 (A) at 822F-824D.

from a claim by the former possessor of heroin, he was unable to do so. To my mind , that finally illustrates why the *Ivanov* approach cannot be sustained.

[16] In my view, therefore, the principle enunciated in the cases discussed in *Pakule* and *Tafeni* applies with equal force to a spoliation claim as it does to a claim under s 31 of the CPA. If this court were to direct that possession of the vehicle be restored to the appellant, it would be 'lending its imprimatur to an illegality'.[13] Consequently, were this court to grant the relief sought, it would be party to allowing 'a state of affairs prohibited by law in the public interest'.[14] As Innes CJ pointed out in *Hoisain v Town Clerk, Wynberg* 1916 AD 236 at 240

'It is sought to compel the Town Clerk to place the applicant's name upon the statutory list; he can only do that upon the grant of a certificate by the Council, which that body has definitely refused to give. Such a certificate is not in truth in existence. So that the Court is asked to compel the Town Clerk to do something which the Statute does not allow him to do; in other words we are asked to force him to commit an illegality.'

In *Essop v Abdullah* 1988 (1) SA 424 (A), this court restated the principle that no court will compel a person to perform an illegality. The relief sought by the appellant, namely possession of the vehicle, would have the result of compelling the police to commit an illegality.[15] That a court should and cannot do. In these circumstances, the appellant is not entitled to spoliatory relief.[16]

[17] I now turn to the question of the costs. The necessity for this is largely occasioned by the fact that the high court, whilst finding that the seizure of the appellant's motor vehicle was unlawful and setting it aside, declined to order the release of the motor vehicle to the appellant. It did so because, as I have already said, it considered that such an order was precluded by virtue of s 68(6)(*b*) read with s 89(1), (2) and (3) of the Act. Consequently, it ordered 'each party to pay its own costs'.

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[13] Per Ponnan JA in *Hubbard v Cool Ideas* 1186 CC (SCA case no 311/12; [2013] ZASCA 71; 28 May 2013).
[14] Id para 11.
[15] See also *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) para 16.
[16] See also *Zulu v Minister of Works, KwaZulu, & others* 1992 (1) SA 181 (D) at 186D.

[18] Although the high court did not furnish reasons for its costs order it may reasonably be inferred that it considered, in the exercise of its discretion, that neither party had achieved substantial success to warrant a costs order in their favour. In this regard it is well to remember that the proceedings in the high court revolved around the issue of lawfulness or otherwise of the search, seizure and continued detention of the appellant's motor vehicle by the police. This was the principal relief sought by the appellant. Concerning this, the parties advanced diametrically opposed contentions. In the event the high court found the search and seizure of the vehicle unlawful but not its continued detention. Accordingly, a court of appeal should be slow to interfere with a costs order of a court of first instance. Thus, this is not an appropriate case in which intervention is warranted.

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

The appeal is dismissed with costs such costs to include the costs of two counsel.

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X M PETSE

JUDGE OF APPEAL

Appearances:

Appellant:	S M Mbenenge SC (with him A M da Silva) Instructed by: Mvuzo Notyesi Inc, Mthatha Israel Sackstein Matsepe Inc, Bloemfontein
Respondents:	N K Dukada SC (with him M M Matyumza) Instructed by: The State Attorney, Mthatha The State Attorney, Bloemfontein