

SOUTH AFRICA / JUDGMENT

## Mini Developments CC v Minister of Police and Another (5188/2022) [2023] ZAFSHC 174 (18 May 2023) [2023] ZAFSHC 174

COURT

Free State High Court, Bloemfontein

BEFORE

Ramdeyal AJ

CASE / FILE NUMBER

5188/2022

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no: 5188/2022

In the matter between:

MINI DEVELOPMENTS CC

Applicant

and

MINISTER OF POLICE

1st Respondent

THE COMMANDER, VEHICLE CRIME

INVESTIGATION UNIT WELKOM 2nd Respondent

CORAM:

RAMDEYAL AJ

HEARD ON:

11 May 2023

DELIVERED ON: 18 May 2023

- [1] This is an application for a declaratory order to have the forfeiture of the applicant's trailers by the South African Police (SAPS) be declared unlawful and invalid; that the 2nd respondent or in his absence a substitute police officer, issue a South African Police Vehicle Identification Pin (SAPVIN) for the trailers and a clearance certificate in terms of the National Road Traffic Regulation.
- [2] It is trite that the SAPS on 15 October 2019 seized the trailers, which belonged to the applicant, on the basis that the Vehicle Identification Numbers (VIN) of the trailers had been tampered with. Thereafter on the 20th of February 2020 the trailers were confiscated and forfeited to the state.
- [3] The applicant in essence seeks the return of the trailers on the basis that more than three years have passed and no criminal prosecution instituted against the applicant or any other person, nor has SAPS proven that the trailers were indeed stolen.
- [4] The respondents in this matter contend that this application for declaratory relief is actually incorrect as an application for review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) is the correct remedy and that this Court cannot encroach on the exclusive institutional power of another organ of State. The respondents further contend that their declaration of the trailers as forfeited to the state is lawful.
- [5] The answering affidavit of the respondent as per pages 115 - 121 of the court bundle explains the details of the tampering of the trailers. It is apparent that on 15 October 2019 two trailers were seized by Warrant Officer Kruger, employed by SAPS. The trailers were seized due to the tampering of the vehicle identification numbers or chassis numbers. The first trailer with registration number CBS 5[...] had 2 different VIN numbers relating to 2 different manufacturers. The VIN number tags appeared to be self-made, with grind marks indicating alteration and falsity. The 2 different VIN numbers belonging to 2 different manufacturers indicated that the origins of the trailers were being hidden. In the second trailer, registration number CBS 5[...], a false tag was found with "pop rivet holes" indicating that numerous tags were previously

placed on the trailer as well as other colours of paint were discovered where the vin number is situated. Clearly in light of the

undisputed facts section 68(6) of the National Road Traffic Act, Act 93 of 1996 was contravened.

- [6] Section 68(6) of the National Road Traffic Act, 1996 states that:

*"a) no person shall with intent to deceive, falsify, replace, alter, deface, mutilate add anything to or remove anything from or in any other way tamper with the engine or chassis number of a motor vehicle; or*

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.”

[7] The respondents seized the trailers in terms of s 20 of the Criminal Procedure Act 51 of 1977 (The Act) which allows the respondent to ‘seize any article which is concerned in or on reasonable grounds believed to be concerned in the commission of an offence’. Evidence of tampering with engine and chassis numbers in itself constitutes a reasonable ground for believing that a vehicle has been stolen.

[8] In *Mbutuma v The MEC for Safety and Security of the Eastern Province*[1] it was said that:

*“it is common knowledge that tampering with engine and chassis numbers takes place almost invariably where stolen motor vehicles, instead of being scrapped and sold in parts are, intended to be transferred intact. This is done so that the motor vehicle cannot easily be traced back to the owner from whom it was stolen. Naturally, therefore, a discovery by the police that the engine and chassis number have been tampered with would ground a reasonable belief that a motor vehicle has been stolen and such motor vehicle would then afford evidence of the commission or the suspected commission of the theft.”*

[9] In *Marvanic Development (Pty)(Ltd) and Another v Minister of Safety and Security and Another*[2] Lewis JA said:

*“...that s 68(6) was clearly designed to change the law in this regard. It expressly precludes possession of vehicles in particular*

circumstances, which the appellants admit to have been present. The mischief that the legislation sought to prevent was the possession,

and thus the use, of vehicles where there has been tampering with engine or chassis numbers, almost invariably because the vehicles

have been stolen. The appellants’ possession would thus be ‘without lawful cause’ in contravention of s 68(6). I emphasise that it is not possession of the vehicle per se that is unlawful: it is possession of a vehicle with false engine or chassis numbers that is without lawful cause”.

[10] Possession of a vehicle where there has been tampering with its engine or chassis number is forbidden, the National Road Traffic does not confer authority on anyone to allow it.[3]

- [11] The trailers were declared forfeited to the state in terms of s 31(1)(b) of the Criminal Procedure Act 51 of 1977 on the 26th of February 2020. The procedure thereof is not actually in dispute. No criminal proceedings have been instituted as yet and no person was found to lawfully possess the trailers. The applicants now seek remedy from the Court to declare the forfeiture orders invalid and for the return of the trailers. The provisions of section 31(1)(b) of the Criminal Procedure Act are clear.

*“If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.”*

- [12] In *Dookie v Minister of Law and Order & Others*[4] the court held that the requirement that no criminal proceedings were pending ‘would not be satisfied merely by proof that no proceedings were pending at the time of the institution of the application for return of the article; but that it was necessary for the applicant to establish that there was no reasonable likelihood of criminal proceedings being instituted in connection with the article in the foreseeable future. That has not actually been established in this matter by the applicant however, criminal proceedings can be instituted at any time as

investigations never really seize.

- [13] The applicant submits that they did not know of any tampering until it was pointed out to the driver, SAPS made no attempts to establish the original details of the trailers, the trailers have a legitimate trade history as is evident from the documentation on file, the trailers have had many previous owners and it is obvious that they must have been cleared by the registration authorities and SAPS.

- [14] Paragraph 11 above clearly indicates that these trailers were tampered with and is clearly unlawful to possess. It remains questionable as to how these trailers even passed through the relevant registration authorities. Whilst no criminal proceedings are currently pending it remains a likelihood of proceedings being instituted in the future resulting in these trailers being needed for trial.[5]

- [15] The same principals were applied in *The Minister of Police v Stanfield*[6] which involved the retention of firearms by SAPS in terms of s 31(1)(a) of the CPA. At paragraph 22 it was said that:

*“this court is not enjoined to finally decide whether the licences were obtained unlawfully. That is the subject matter of the criminal*

*proceedings. This court must decide on a balance of probabilities, whether the appellants retention of the firearms is justified.”*

In the circumstances of this matter, indeed the respondents’ retention of the trailers appears justified.

- [16] I am alive to the decision of *Nqukumba v Minister of Safety and Security and Others*[7] that an individual can possess a tampered vehicle as long as there is lawful cause for its possession, but *Nqukumba's* case was dealt with in terms of mandament van spolie and where the police seized such tampered vehicle apparently unlawfully.
- [17] Interestingly the Supreme Court of Appeal[8], held that a vehicle seized by the police cannot be returned to a person from whom such item was seized if any features as set out in section 68 (6) (b) of the National Road Traffic Act are present. The manner in which these trailers were tampered with in this matter clearly indicates the origin of ownership being hidden hence, the applicant therefore did not lawfully possess these trailers.
- [18] In *Pakule's* case at paragraph 31, the Supreme Court of Appeal referred to the above decisions as discussed

and said that there should no longer be any doubt that a vehicle seized by the police cannot be returned to persons from whom they

have been seized if any of the features referred to in section 68(6) of the National Road Traffic Act are present. A return of the trailers to the applicants may in any event be a futile exercise as the trailers may in any event be seized again[9].

- [19] The lawfulness of the seizure of the vehicles is not in dispute. Features as mentioned in section 68 are present; therefore, the combatting of crime such as this must invoke the provisions of section 20 and 31 of the CPA.
- [20] The applicant submits that section 68 of the National Road Traffic Act is an impediment to their possession and seeks an order that the second respondent or a substitute thereof issue a SAP VIN to the trailers, clear the trailers in terms of regulation 56(5)(b) of the Traffic Regulations and issue a clearance certificate for it. All necessary documentation enabling the applicant to register the trailers should be completed. The applicants were notified that the trailers were confiscated and forfeited to the state on 26 February 2020. Some 3 years later they seek an order from this court in terms of a declaratory order declaring the forfeiture of the trailers by SAPS as unlawful and invalid; for this court to issue SAPVIN numbers and to clear the trailers in terms of Regulation 56(5) (b). The applicant in this matter, in my view should have followed the procedure as set out in the Regulations timeously. Regulation 56 of the National Road Traffic Regulations sets out the procedure to be followed for a vehicle owner to obtain from the police the new engine or chassis numbers where they have been tampered with.
- [21] An application for declaratory relief as sought by the applicant is recognized as an efficient and versatile remedy clarifying issues of law expeditiously. The applicant seeks remedial action in the form of

what essentially amounts to a mandatory interdict.[10] According to the respondents the applicant is precluded from doing so by the subsidiarity principle whether by common law or the principal of legality.[11]

[22] PAJA is now in operation, enacted by the Legislature to comprehensively give effect to a constitutional

right. The Promotion of Administrative Justice Act 3 of 2000 is to give effect to the right to administrative action that is lawful, reasonable and procedurally fair. Courts should no longer be faced with the difficult task of deciding what constitutes administrative action or what procedure should be followed since the recent decision of the Constitutional Court pertaining to the application of PAJA appears to clear this issue. In *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality*[12] the following was said:

*“PAJA is, of course, now in operation and this dictum is therefore instructive. This Court has on various occasions endorsed the*

principle of subsidiarity. This principle provides that where legislation is enacted in order to comprehensively give effect to a constitutional right, a litigant cannot bypass the relevant legislation and rely directly on the Constitution or on the common

law, without challenging the constitutional validity of that legislation. The principle has two foundational justifications: to

mitigate against the development of “two parallel systems of law”, one judge-made and the other crafted by Parliament, and to ensure “comity between the arms of government” by maintaining a “cooperative partnership” between the various institutions and arms tasked with fulfilling constitutional rights.

PAJA is constitutionally mandated legislation, designed to give effect to section 33 in both substantive and remedial terms. The applicant did not specifically base its case on section 33. Nonetheless, its central submission was that the respondent owed it a legal duty, actionable in delict, not to cause it to sustain economic loss through an intentional breach of section 217. According to the applicant, it is the alleged intentional breach by the state of its duty to ensure just administrative action in a tender process, which is actionable in delict. To make this finding, however, would subvert the principle of subsidiarity. It would entitle litigants to bypass the provisions of PAJA, in order to hold the state liable in terms of the common law and, in this way, give rise to “two parallel systems of law”.

[23] In conclusion, not only is it apparent that the applicant may have used the incorrect remedy, it is clear that Section 68 is designed to prevent people from driving vehicles that are tampered with. At the time the trailers were seized the applicant possessed same without lawful cause. The fact that these trailers were seized under those circumstances as set out in Section 68 will not make their return to the applicant lawful. SAPS is responsible for the process of issuing SAP VIN numbers and clearance certificates as ordained by the Legislature and as required by the applicant. Courts are generally reluctant to encroach into

its terrain. In the circumstances of this matter as discussed, I find no merit in the application for an order to declare a lawful order of the respondent invalid and unlawful. Hence, I make the following order:

The application is dismissed with costs.

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RAMDEYAL AJ

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[1] 1998

(1) SACR 367(Tkd) at 370 c – d.

[2] [2006] SCA 20 (RSA) paragraph 10.

[3] Basie Motors BK t/a Boulevard Motors v Minister of Safety and Security (135/05) 2006 ZASCA 35 at paragraph 8.

[4] 1991

(1) All SA 390 (D); 1991 (2) SACR 153 (D) at 156 C – E.

[5] Van der Merwe and another v Taylor No and Others [2007] ZACC 16; 2008 (1) SA 1 CC para 51.

[6] (1328/2018)

[2019] ZASCZA 183.

[7] 2014 ZACC 14.

[8] Pakule v Minister of Safety and Security and Another; Tafeni v Minister of Safety and Security and Another 2011 (4) All SA 159 (SCA) 30 – 32.

[9] See Pakule paragraph 32.

[10] Paragraph 27 of applicant's heads of argument

[11] Respondents' heads of argument paragraph 7.

[12] 2022 ZACC 41; 2023 (2) SA 31 (CC) at paragraphs 45 and 46.

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