

SOUTH AFRICA / JUDGMENT

Ngqukumba v Minister of Safety and Security and Others (1354/2010)

[2011] ZAECMHC 18 (20 October 2011)

[2011] ZAECMHC 18

COURT

Eastern Cape High Court, Mthatha

BEFORE

L.P Pakade

CASE / FILE NUMBER

1354/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION: MTHATHA)

CASE NO: 1354/2010

In the matter between:

ANELE NGQUKUMBA

.....Applicant

And

MINISTER OF SAFETY AND SECURITY

.....1stRespondent

STATION COMMISSIONER, MTHATHA

CENTRAL POLICE STATION

.....2nd

Respondent

COMMANDING OFFICER, VEHICLE

SAFEGUARD UNIT, GROUP SIX, MTHATHA

.....3rd

Respondent

JUDGMENT

PAKADE ADJP.:

- [1] This is an application in which the applicant seeks an order declaring the seizure and retention of his motor vehicle, a Toyota Hilux with registration letters and number BTR 190 EC, by the members of the South African Police Service Mthatha, unlawful. The

further order sought by the applicant is a mandamus directing the respondents to release the motor vehicle to the applicant, forthwith.

- [2] The application is opposed by the respondents and answering affidavit on their behalf has been deposed to by Ms Nomsithelo Dungelo, (Nomsithelo) a constable employed by the first respondent and stationed at the motor vehicle identification section in Mthatha.
- [3] During February 2010, the applicant's motor vehicle, which the applicant uses as a taxi to convey passengers for reward , was seized by members of the South African Police Service at Golden Egg taxi Rank in Mthatha without a seizure warrant. The police

officers who seized the motor vehicle informed the driver thereof, Anele Mkhathswa, that there is information at the disposal of the police that the vehicle was a stolen item. Thereafter, the vehicle was driven by Mr Mkhathswa to the police station, on the instructions of the police. A further search was made on the vehicle in the police station . The police found that the chassis and engine numbers of the vehicle had been grounded off. They conveyed their finding to Mr Mkhathswa and also directed him to tell the owner of the vehicle to come to the police station.

- [4] The applicant went to the police station where he met the investigating officer, Inspector Mncwati who indeed confirmed to him the information the police had about the vehicle and also the finding by the police of grounded engine and chassis numbers . The

applicant refuted that allegation and even produced documents purporting to show that the vehicle belonged to him although still

registered in the name of one Nqadolo James from whom he had purchased it. He further explained to Mncwati that the reason for

having the vehicle registered in the name of Nqadolo James is that in terms of the sale agreement he had with him, ownership had to remain with Nqadolo until the full purchase price of the vehicle had been paid, which was not the case at the time of the seizure of the motor vehicle.

- [5] The police refused to release the vehicle to him on that day relying on the ground that they were still investigating about it. When the applicant wanted to know when the investigations would be completed, Mncwati responded that in two weeks time the investigations would have been completed.
- [6] After two weeks, the applicant went back to the police station to demand the release of his motor vehicle. Inspector Mncwati informed him that he had circulated the motor vehicle but had found nothing irregular in it, nevertheless he still needed experts

to conduct further investigations on the vehicle. The applicant protested against further investigation and demanded immediate

release of the vehicle to him but Mncwati refused. He left the police station.

- [7] On his return after a month, Inspector Mncwati told him that the investigations were still incomplete as he was still awaiting for the arrival of the experts from Toyota South Africa Manufacturers. He then told the applicant to come back after six months as the experts were delayed by their busy schedule. The applicant then consulted with the attorneys of record who subsequently brought the present application.
- [8] The applicant was quick to aver that the police official never disclosed to him that the motor vehicle had some irregularities. They only relied on information that the motor vehicle is stolen, so said the applicant. He had told Inspector Mncwati that there was nothing irregular in the motor vehicle as, on information he had received from Nqadolo James, the vehicle had been cleared by the police who issued a clearance certificate to him. It is clear that if the applicant went to the police station , he should

have been responding to a report given to him by Mkhathswa that his vehicle had been impounded by the police and that suspicious features had been found thereon upon its inspection at the police station. He had nothing to gainsay the finding of the suspicious features in the vehicle but only the information which the police had, by producing the registration certificate of the vehicle. Even then, he failed to produce the police clearance certificate to them. The result is that these suspicious features on the vehicle are still intact and remain unchallenged.

- [9] Save to admit that the seizure was done without a warrant, the respondents have countered the applicant's averment that there was no reasonable suspicion that the vehicle is an item to warrant a seizure. Their case is that the police were investigating a case of possession of a suspected stolen motor vehicle against one Njiyela Simbonile who had been charged with that offence. The police officers aver that when Njiyela Simbonile was interrogated about possession of a suspected stolen motor vehicle (a different vehicle from the one in issue in this application), he volunteered information to the police that he had also been involved in stealing the motor vehicle which is the subject matter of these proceedings. At the time the police received this information this

motor vehicle had not yet been seized. The said Njiyela offered to take the police to the taxi rank where the vehicle was parked in order to point it out to them. Indeed, the police went to the taxi rank next to Golden Egg together with Njiyela. On their arrival in that rank, Njiyela pointed out a motor vehicle in which Mkhathswa was seated on its driver's seat, as the vehicle which was stolen by him. The police confronted the driver, and informed him that they had information that the motor vehicle in which he was seated was stolen. Mkhathswa responded that he knew nothing about that because the vehicle did not belong to him.

- [10] At the police station the police found the following irregularities in the vehicle: its chassis plate appeared to have been tampered with; the engine number was grounded off and the manufacturers tag plate had been removed.

[11] Nomsithelo stated that the applicant never visited the charge office up till the day of her deposition to the answering affidavit. She disputed that the motor vehicle was ever cleared of any irregularity by the police as alleged by the applicant. Based on these irregularities, the respondents aver that in terms of the National Road Traffic Act, 93 of 1996 the applicant is prohibited from lawfully taking possession of the vehicle. Further, an expert from Toyota South Africa Motor Vehicle identification unit, Mr Francois Muller, inspected the motor vehicle at the police station and found the following defects:

1. That the job number tag firewall had been removed and thereafter tampered with;
2. The rest of the engine number commencing with 3y was removed and therefore tampered with;
3. The manufacturer's plate was removed from the HiAce bus and replaced into this vehicle;
4. The chassis plate was cut out from a bus and rewelded onto this motor vehicle;
5. The job tag was removed and
6. The engine number was removed.

It is worth noting that these findings correspond with the finding which had earlier been made by the police before the arrival of the expert from Toyota South Africa.

[12] The applicant deposed to a replying affidavit in which he denied the information allegedly offered by Njiyela to the police that the motor vehicle was stolen. He further denied that the chassis plate of the motor vehicle had been tampered with and /or

removed from another vehicle and placed onto his motor vehicle; that there were no engine numbers on the motor vehicle and that the manufacturer's tag plate was removed from another vehicle and placed on to this vehicle. He stated that even if those

irregularities were found on the vehicle they were found after the search and the seizure had been made without a warrant. From this premise, the applicant concludes that these ex post facto findings are irrelevant for the determination of this application, whose nature is spoliation.

[13] The principles which apply in this case and which are not in dispute are the following:

1. The respondents bear the onus of proving, on a balance of probabilities, that the seizure of the motor vehicle was lawful, otherwise the vehicle should be returned to the applicant.
2. If the respondents succeed in discharging the onus relating to the seizure of the motor vehicle, the applicant bears the onus of proving that the requirements of section 31(1)(a) of the Criminal Procedure Act, 51 of 1977 (the Act) have been satisfied. These are that no criminal proceedings had been instituted concerning the vehicle or that the vehicle will not be required at the trial as evidence or for purposes of an order of court.

3. The onus that rests on the applicant is to show that no proceedings have been instituted and that there is no reasonable likelihood that proceedings may be instituted in the foreseeable future.
4. If the applicant discharges this onus, the vehicle will have to be returned to the applicant unless the respondents were to discharge the onus of showing that the applicant may not lawfully possess it.
5. The method of showing that the applicant may not lawfully possess the vehicle is for the respondent to show that the vehicle is stolen.
6. In the event of a genuine dispute of fact on the papers the matter must be decided on the respondents' version, even on issues where the onus is on the respondents.

[14] Mr Notyesi, who appeared for the applicant, informed the Court, at the commencement of the hearing, that the applicant was seeking a final relief on the papers and would not argue in the alternative that the matter be referred to oral evidence.

[15] I must state right from the outset that the respondents' version is that there were no criminal proceedings which had yet been instituted as the case was still under investigation at the time of the applicant bringing this application but were, nonetheless, certain that such proceedings would be instituted in the near future once the investigations are completed.

[16] In terms of section 20 of the Act, which is applicable in this case, the State may seize 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...

[17] It is common cause or is not disputed in the papers that the seizure of an article under section 20 must be based on at least a reasonable suspicion that the article was the one contemplated in section 20. The approach to the interpretation of section 20 has been laid down in a number of cases. In *Ndabeni v Minister of Law and order*¹, Didcott J said:

"The second respondent no doubt thought there were reasonable grounds for the belief he had. That, however, was by the way. Section 20 of the Criminal Procedure Act calls for the existence in fact of reasonable grounds. And whether these exist in a given case must be determined objectively. Milner J once said: 'There can only be reasonable cause to believe... where, considered objectively, there are reasonable grounds for the belief... It cannot be said that an officer has reasonable cause to believe... merely because he believes he has reasonable cause to believe.'"

[18] This test was followed in this Division in a number of cases, including the unreported Full Bench judgment of Zilwa AJ in *Hiya vs Minister of Safety and Security* and another ²; *Sigwebendlana vs Minister of Police*, ³reportable judgment of Davis AJ and Kgotsa Zinja vs

Minister of Safety and Security and another⁴, unreported judgment of Pakade J. In all these cases, this Court held that there must be a reasonable suspicion to justify the seizure of a motor vehicle as contemplated in section 20 and that if the Court finds that there was no such reasonable suspicion to justify the seizure, *cadit quaestio*, the vehicle must be returned to the person from whom it was seized if he/she may lawfully possess it. This Court emphasized that the test to determine the reasonableness of the suspicion is objective.

[19] I now turn to summarize the salient facts of the applicant's case after which I will do the same in the respondent's case for purposes of coming up to a decision. The applicant's case, as gleaned from the founding papers, is that the police failed to show that, objectively, they had reasonable suspicion before they effected the seizure, that the motor vehicle is stolen and that the information on which they relied as establishing that reasonable suspicion was not sufficient to enable them to formulate that suspicion because the person who furnished them with it neither made a statement to the police nor deposed to a supporting

affidavit in these proceedings. Secondly, relying on the Full Bench judgment of *Hiya vs Minister of Safety and Security, Kgotso Zinja and Minister of Safety and Security* he contends that the factors relating to the finding of irregularities in the motor vehicle when being searched subsequent to the seizure, are subjective and irrelevant in spoliation proceedings.

[20] The respondent's case, on the contrary, is based on the objectively determined factors of reasonable suspicion and on the subjectively determined factors of the finding of suspicious features in the motor vehicle subsequent to the seizure.

[21] In *Hiya vs Minister of Safety and Security, Zilwa AJ* had the following to say on these tests ⁵

"The respondent, throughout, bore the burden of proof to show the reasonableness of the belief that the vehicle was an article liable to be seized in terms of the section. Mr Sivuku, who appeared for the respondent, was very hard pressed to submit to the contrary. In my view the mere fact that after the vehicle had been seized in terms of the warrant that was issued upon application by the policemen, was subsequently found to have suspicious features such as the allegedly ground engine number and altered chassis number

[which facts are disputed by the appellant], is irrelevant for the purpose of determining the issue. Even if the respondents'

version could be accepted that indeed such unsatisfactory features were found on the vehicle, the point of the matter is that before the vehicle was seized and such features were found the seizure in the first place had to be proper and had to comply with the requirements of section 20".

[22] Based on the *Hiya* judgment, this Court had the following to say in the *Zinja vs Minister of Safety and Security* judgment⁶:

“...the proper approach in my view, is to first determine if the motor vehicle that was seized is an article which was liable to be seized in terms of section 20. If it is not such article then cadit quaestio, that is the end of the matter and the applicant must succeed in this application. But if the court finds it was an article liable to be seized then an enquiry must be held as to the validity of the seizure warrant.”

This approach was followed in the subsequent judgments of *Zukiso Manzi vs Member of Executive Council and others*⁷ unreported judgment, *Mzukisi Buthongo vs Minister of Safety and Security and others*⁸ also unreported judgments of this Division and *Guga vs Minister of Safety and Security and others*⁹.

[23] In the *Zinja* judgment although the respondents’ papers disclosed that there were suspicious features in the motor vehicle seized, found after the seizure, the court did not deal with the subjective test relating to the subsequent finding of those features because the subjective test had been held to be irrelevant in determining the reasonableness of the suspicion¹⁰.

[24] The Full Bench judgment of *Hiya* did not consider another judgment of this Court in *Mbuthuma vs MEC for Safety and Security of the Eastern Cape Province*¹¹ which had been decided in the previous year and which was decided on the basis of objectively determined factors of suspicious features

discovered before the seizure of the motor vehicle. In that case, *Madlanga J* had said that it was common knowledge¹² that engine and chassis numbers would be tampered with where it is intended that a stolen vehicle be sold intact. Such tampering would ground a reasonable belief that the vehicle has been stolen and will justify a seizure without warrant or the consent of the owner. The judgment does not, in my view, consider the second step in the enquiry, concerning the validity of the seizure justified by a warrant or by consent of the applicant. If the court finds that s 20 of the Act had been satisfied it should go further and consider the validity of the seizure by section 21 or 22 of the Act.

[25] The facts in the *Mbuthuma* case are crisply that three police officers visited the applicant’s place in connection with a red Isuzu light delivery van. They found the applicant and asked him the whereabouts of this van. The applicant’s response was in the negative. Meanwhile, the two motor vehicles, a Toyota Venture and a Toyota Hilux were in the applicant’s premises. The three policemen inspected these two vehicles and found that the engine and chassis numbers thereof had been grinded off and

restamped. They then seized the two vehicles without a warrant.

[26] These facts are distinguishable from those of *Hiya*. In *Hiya* the finding of tampering with the chassis and engine numbers in the motor vehicle was made subsequent to the seizure whereas in *Mbuthuma* it preceded the seizure. It would appear in my view, that

the *Hiya* matter was correctly decided on the basis of objective test and the court correctly, in my view, rejected the application of the subjective test shown by the finding of suspicious features after the seizure. The *Mbuthuma* case was again, in my view, correctly decided on the objective test because the police officers entertained, before the seizure, a reasonable belief that the two

vehicles were stolen. The reasonable belief which the police officers had would be the basis for issuing a warrant but leaving the vehicles to obtain a warrant would certainly defeat the object of the seizure .

[27] The applicant has fashioned his cause of action on the spoliation remedy. In *Nino Bonino vs De Lange*¹³, Innes CJ defines spoliation as an illicit deprivation of another of the right of possession which he has in regard to movable or immovable property or even in regard to legal right.

[28] In order for the applicant to succeed in spoliation proceedings, he must allege and prove that he was in peaceful and undisturbed possession of his property. The possession is not the one in the juridical sense and it suffices if the holding of the property

by the applicant was with the intention of securing some benefits for him. The cause of the applicant's possession is irrelevant

whether the respondent has a stronger right of possession or not. Actual possession not the right to possession is protected (*Yeko vs Qhana*)¹⁴. The applicant must further allege and prove unlawful dispossession, either without his consent or without legal process such as court order or seizure warrant. Applicant's possession and the respondent's rights to possession are not justiciable in the

proceedings for a mandament van spolie, there are no real defenses which do not amount to a denial of the applicant's allegation.

[29] The respondents' defence is that they complied with the law in seizing the motor vehicle because they had information from a reliable source, a suspect in another case, that the vehicle is stolen. Their submission is that the information they had was sufficient to satisfy section 20 of the Act. Further, they state that Mkhathswa, the driver of the motor vehicle, consented to the seizure. In my view, only the applicant, and not his agent, the driver of the motor vehicle, could legally give consent to the seizure of the motor vehicle.

[30] In the replying affidavit filed, the applicant denied that there was information in terms of which the respondents acted in seizing the motor vehicle as the person who furnished it, would have deposed to an affidavit to that effect or would have made a statement to the police which would have then been made available to the court.

[31] As Davies AJ said in *Sigwebendlana vs Minister of Police*¹⁵, it is for the court to judge whether objectively there were reasonable grounds for such belief; that in the absence of more detailed information, it is not possible for the court to come to that conclusion. I agree with this observation. The information on which the police officers relied in seizing the item must be placed before the court to enable it also to make a finding on the same information . That information which the police officers have must be scrutinized by the court because acting on unverified information

interferes with the undisturbed possession of a person's property which infringes a person's constitutional right to property¹⁶. The ipse dixit of the police without the evidence of Njiyela Simbonile is insufficient to generate a reasonable belief especially when their ipse dixit is viewed against their very failure to institute criminal proceedings on the vehicle. This would then mean that the vehicle is not an item that is required for purposes of evidence or exhibit or an order of court in a criminal trial. If the information at the disposal of the police is anything to go by it would not have been difficult to institute criminal proceedings in connection with the vehicle because there was readily available evidence.

- [32] In *Dyani vs Minister of Safety and Security and others*¹⁷, Jafta J found that the circumstances of that case justified an order that the vehicle be returned to the applicant on the basis that such relief would be similar to the relief granted in spoliation applications.
- [33] Jafta J was also, in my view, correct because in spoliation proceedings the court is concerned with whether there was a lawful seizure or not. A seizure in terms of section 21, with a warrant or in terms of section 22, without a warrant, is lawful provided that it complies with section 20. If it does not, it is unlawful and *cedit quaestio*, (that is the end of the matter)¹⁸. This is so because the court is dealing with spoliation which requires speedy relief to be given on the simple facts of possession

and dispossession. This, naturally involves short affidavits filed expeditiously on those limited facts so that adjudication takes place *ante omnia* and speedily¹⁹. This is so because spoliation is a remedy *sui generis* afforded to possessors whether *mala fide* or *bon fide* or thieves, who have been deprived of possession unlawfully, to have such possession restored to them *ante omnia* so that he remains in undisturbed possession of his property. There is significant distinction between the possessory remedy of spoliation and *rei vindicatio* which are both remedies for reclaiming possession. If the litigant chose to recover possession with the *rei vindicatio*, then he must prove the requirements thereof. Therefore the case to which Mr Matyumza, counsel for the respondents, referred in *Van Der Merwe and another vs Taylor NO and others*²⁰ is not relevant to spoliation but to *rei vindicatio*.

- [34] Mr Matyumza submitted that because of the tampering with the chassis and engine numbers in the vehicle, it would be contrary to law to release the vehicle with tampered parts as such will be a contravention of section 68 (6)(b) of the National Road Traffic Act, 93 of 1996. He referred to the following cases for this submission: *Powell NO vs Van Der Merwe*²¹; *Vrystaat Motors vs Henry Bhgnant (Edms) Bpk* ²²; *Khan vs Minister of Law and Order*²³; *Nel vs Deputy Commissioner of Police, Grahamstown and others*²⁴; *Minster Van Wet En Order En Ander vs Datnis Motors (midlands) (Edms) Bpk*²⁵; *Van Der Merwe and another vs Taylor NO and others* ²⁶; *Ngwenduna Boya vs Minister of Safety and Security and others*²⁷ unreported judgment of this court by Miller J; *Marvalanie Development (Pty) Ltd and Another vs Minister of Safety and Security*²⁸; *Kgosana vs Otto*²⁹ and *Hako vs Minister of Safety and Security*³⁰.

- [35] Mr Matyumza contended that on the basis of these authorities the judgment in *Ntombentsha Mgxongo vs Minister of Safety and Security*³¹ Full Bench judgment of this division: *Hiya vs Minister of Safety and Security*; *Dyani vs Minister of Safety and Security*; *Khonono vs Minister of Safety and Security* and two others; *Mzileni vs Minister of Safety and Security*³² by Rall AJ; *Shumane vs Minister of Safety and Security* ³³by Peko J; *Tshongozi vs Minister of Safety and Security* and *Guiliano vs Minister of Law and Order* ³⁴ were all wrongly decided.
- [36] The cause of action in the cases referred to by Mr Matyumza was based on *rei vindicatio* in which the adjudication of the merits of the respondent's rights is permissible. The list of cases which Mr Matyumza contends were wrongly decided had their cause of action couched in the spoliation remedy which is adjudicated speedily and *ante omnia*. In *Painter vs Strauss* ³⁵ the court said about the spoliation remedy:
- “the mandament van spolie is employed to prevent people from taking the law into their own hands and it requires the property dispoiled to be restored as a preliminary to any enquiry or investigation in the merits of a dispute”*
- [37] Lastly, I must now consider whether or not the applicant can lawfully possess the vehicle in the light of section 31
- (1) (a) of the Act which provides that if no criminal proceedings are instituted in connection with the article or if it is not required at the trial for purposes of evidence or order of court it shall be returned to the person from whom it was seized if such person may lawfully possess it or if such person may not lawfully possess it, to a person who may lawfully possess it. The onus is on the respondents to show that the applicant may not lawfully possess the vehicle. In this respect the respondents state that the applicant is prohibited from lawfully possessing the motor vehicle with tampered chassis and engine numbers. Here, this Court is bound by the judgment of the Supreme Court of Appeal in *Marvanic Development Pty (Ltd) and another vs Minister of Safety and Security* and another³⁶ where in similar circumstances the Court refused to release the vehicle to the applicant until such time as he has been issued with new chassis and engine numbers under the National Road Traffic Regulations and with a police clearance certificate by the registering authority. The recent authority on the same point is that of *Phakule and Thafeni vs Minister of Safety and Security* ³⁷an unreported judgment of the Supreme Court of Appeal on matters which emanated from this Division. In both decisions of the Supreme Court of Appeal the finding of suspicious features in the motor vehicle was made before the seizure.
- [38] That the use of a motor vehicle with tampered chassis and engine numbers on a public road is unlawful is clear from the peremptory language of section 89 (1) (2) (3) of the National Road Traffic Act. It provides as follows:

“(1) 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.

- (2) Any person convicted of any offence in terms of subsection(1) read with section 42(1) or (2), 44(1), 45(2), 46(1) or 64(1), (2), (5) or (9) shall be liable to a fine or to imprisonment for a period not exceeding six years.”

Section 42(1) prohibits the operation of a motor vehicle which is not roadworthy on a public road. Section 44(1) provides that if a motor vehicle is not roadworthy a traffic officer or an examiner of vehicles may, by notice in the prescribed form served on the

driver, owner, or operator of such vehicle, direct that such vehicle shall not be operated on a public road or that such vehicle shall only be operated on the prescribed conditions. The traffic officer is empowered by section 3 (1) to direct that a motor vehicle whose engine and chassis numbers differ with the registration and licensing document of such vehicle be taken forthwith to any police station for police clearance. The finding of grounded chassis and engine numbers in a vehicle subsequent to its seizure justifies in my view, the detention thereof until a clearance certificate is issued by the police and the vehicle reregistered under the National Road Traffic Act.

[39] The following order is therefore made:

The seizure of the motor vehicle, described as Toyota Hilux with registration letters and number BTR 190 EC is declared unlawful and is set aside;

The retention of the same motor vehicle by the members of the South African Police Service in Mthatha is declared lawful until such time the police clearance certificate is issued and the vehicle reregistered under the National Road Traffic Act, 93 of 1996;

Each party is ordered to pay its own costs.

L.P Pakade

ACTING DEPUTY JUDGE PRESIDENT

For the applicant : Mr Notyesi

Instructed by : Mvuzo Notyesi Inc

For respondent : Adv Matyumza

Instructed by : State Attorney

Heard on : 08 March 2011

Delivered on : 20 October 2011

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2Case no: 506/99

3Case no:27/94

4Case no:47/2005

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6Case no: 47/05, par 17

7Case no:148/05

8Case no

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10Hiya vs Minister of Safety and Security

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12Page 370 be

13 1906 TS 120

141973(4) SA735 (A)

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16Section 25(1) of the Constitution,108 1996

172001(1) SACR 634(TKD) at 642 f

18Kgotso Zinja v Minster of Safety and Security

19Willowvale estates cc and another vs Bryanmore estates LTD 1990 (3) SA 954 (WLD)

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