

SOUTH AFRICA / JUDGMENT

S v PL breytenbach Transport Contractors (Pty) Ltd and Another (189/87) [1988] ZASCA 60 (26 May 1988) [1988] ZASCA 60

COURT

Supreme Court of Appeal

BEFORE

Hoexter, Nestadt, Vivier, Nicholas, Boshoff

CASE / FILE NUMBER

189/87

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P L BREYTENBACH TRANSPORT CONTRACTORS

(PTY) LTD. FIRST APPELLANTRAMSAMMY NAIDOO SECOND APPELLANTandTHE STATE
RESPONDENT

Judgment by H H NESTADT

CASE NO. 189/87 CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)In the matter betweenP L BREYTENBACH TRANSPORT CONTRACTORS

(PTY) LTD FIRST APPELLANTRAMSAMMY NAIDOO SECOND APPELLANTandTHE STATE
RESPONDENT

CORAM: HOEXTER, NESTADT, VIVIER JJA et NICHOLAS, BOSHOFF AJJA

DATE HEARD: 17 MAY 1988

DATE DELIVERED: 26 MAY 1988

JUDGMENT NESTADT, JA:

First appellant carries on business

as/ 2. as a long-distance hauler. Second appellant is a director of the company. They, together with a third accused, an employee of first appellant, were convicted in a magistrate's court of unauthorised road transportation in contravention of sec 31(1)(a) of the Road Transportation Act, 74 of 1977. The third accused was the driver of the vehicles used in the unlawful transportation. They were a motor traction vehicle (a so-called mechanical horse) and a trailer. For the purposes of this judgment it may be assumed that they were owned by first appellant. Following upon

sentence (in each case a fine was imposed) the vehicles were, in terms of sec 36(1) of the Act/

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Act, declared to be forfeited to the State.

Sec 36 provides:

"36. (1) The court convicting any person of an offence under this Act involving the undertaking of unauthorized road transportation or of an offence under section 31(1)(e) may, and shall on a third and each subsequent conviction of such an offence, declare the motor vehicle used in such transportation and any goods conveyed thereon without authority, or the convicted person's rights in such motor vehicle or goods, to be forfeited to the State: Provided that such declaration shall not affect any rights which any person other than the convicted person may have to the motor vehicle or goods in question, if it is proved that such other person did not know that the said motor vehicle was being or would be used in unauthorized road transportation or that he could not prevent such use, or that such other person did not know that the transportation of the said goods constituted or would constitute unauthorized road transportation or that he could not prevent/

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prevent the undertaking of such transportation.

(2) Section 35(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), shall mutatis mutandis apply with reference to any forfeiture under subsection (1) of this section."

Sec 35(4) of Act 51 of 1977 gives effect to the proviso to sub-sec (1) by enabling, inter alia, what I shall call the innocent owner of the vehicle in question to apply for the setting aside of the declaration of forfeiture and for an order that the vehicle be returned to him or that compensation for it be paid by the State.

The magistrate considered himself obliged to make the forfeiture order. This was because the second appellant had three previous convictions for unauthorised road transportation. First appellant's

contention/ 5. contention that because it had no such previous convictions, the court had a discretion (which it was said should be exercised against forfeiture), was rejected. An appeal to the Transvaal Provincial Division (against the forfeiture order only) was dismissed. It was held that the magistrate's interpretation of sec 36(1) was correct. Appellants, still feeling aggrieved, now appeal further to this Court (with its leave). Actually, only first appellant is interested in its outcome.

The matter can be briefly dealt with. Before us, Mr Penzhorn, on behalf of appellants, abandoned the contention that on a proper interpretation of sec 36(1), forfeiture would only have

been/ 6. been compulsory if first appellant had three or more previous convictions (of the kind stipulated). It was accepted that, by reason of second appellant's previous convictions, the forfeiture order made by the trial court was not only competent but compulsory. Nothing more need, therefore, be said about this aspect of the matter. This ought to have been the end of the appeal. However, counsel sought to advance an entirely different argument in support of the contention that the forfeiture order should be set aside. It rested, not as before, on the substantive part of sec 36(1), but on the proviso. In short, it was that the forfeiture order which had been

made/ 7. made, did not affect first appellant's rights (of ownership) in the vehicles. This was because first appellant was allegedly ignorant of second appellant's previous convictions. For the following reasons this new approach cannot avail first appellant and is, indeed, without merit.

- (i) The point was not taken in its petition in terms of sec 316(6) of Act 51 of 1977. Accordingly, leave to appeal on this ground was never granted. (ii) The forum for dealing with the issue whether first appellant falls within any of the terms

of/ 8. of the proviso and is thus entitled to the release of the vehicles, cannot be this Court. It is the trial court. Evidence should, in support of an application under sec 35(4) of Act 51 of 1977, have been placed before it to establish the particular part of the proviso relied on. There was no such evidence or, indeed, application. This is not surprising. The proviso was not in issue. All that was in issue was the magistrate's duty, as distinct from his having a discretion, to grant a forfeiture order. (iii) Above all, the ground on which first appellant seeks to invoke the proviso, i e that it did

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not know of second appellant's previous convictions, is simply not covered by its terms. Recognising this, Mr Penzhorn submitted that the following should be read into the proviso (at the end thereof).

"or that he did not know that such use would constitute the undertaking of unauthorised road transportation, or an offence under Section 31(1)(e), for a third or subsequent time by the person so convicted."

It was said that the omission to cater for an owner being able to rely on the proviso on this ground as well, was a lacuna in this section which, unless rectified by "construing"

it/ 10. it in the manner suggested, would lead to a glaring absurdity which the Legislature could never have intended. I do not agree. In the situation postulated, it may be (I so assume in favour of first appellant) that hardship or inequity might result (though even this is doubtful because the owner, not being able to obtain the release of the vehicle on any of the other grounds stipulated in the proviso, is, ex hypothesi, blame-worthy). But this is a far cry from the result being one which, as was argued, falls within the principle of *Venter vs R* 1907 TS

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910. It must be accepted that the Legislature, in enacting sec 36(1), had good reason to exclude an owner's ignorance of his co-accused's previous convictions as a ground for escaping from the consequences of a forfeiture order. To accede to the argument would be to now include it under the guise of construction when, in truth, it amounts to an amendment of the section. That we cannot do.

The appeal is dismissed.

NESTADT, JA HOEXTER, JA) VIVIER, JA) CONCUR NICHOLAS, AJA) BOSHOF, AJA)

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