



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 6240/2020

- (1) REPORTABLE: ~~NO~~/YES
(2) OF INTEREST TO OTHER JUDGES:
NO/~~YES~~
(3) REVISED.

 21/10/2020
In the matter between:

OMJ PROJECTS (PTY) LTD

FIRST APPLICANT

BAOBAO PROJECTS CC

SECOND APPLICANT

and

THE MINISTER OF POLICE

FIRST RESPONDENT

NORTHAM PLATINUM MINE

SECOND RESPONDENT

NATIONAL PLATINUM LIMITED

THIRD RESPONDENT

JUDGMENT

NAUDÉ AJ:

- [1] The First and Second Applicants brought an urgent application wherein the Applicants seek an order directing the Respondents to return the First Applicant's trucks and trailers as detailed in the Notice of Motion back to the First Applicant. The trucks and trailers are currently in possession of the First Respondent. The First Applicant is a heavy haulage and logistics service provider and leases the trucks and trailers from the Second Applicant.

- [2] According to the First Respondent, the police received a complaint on 13 August 2020 about trucks that were used for transporting stolen chrome from the Second Respondent. A case was opened under CAS60/08/2020. Police reaction led to the arrest of five trucks travelling along the R24, transporting alleged stolen chrome. An additional three trucks were allegedly caught by mine security whilst still loading and allegedly stealing chrome. There is according to the First Respondent, no dispute as to how the police managed to arrest the drivers of the trucks and recover the alleged stolen chrome. It is further not in dispute that a number of people were charged with criminal offences. Upon arresting the trucks, trailers and drivers, including those trucks and trailers that were found on the Second Respondent's mine premises, the police left the trucks on the Second Respondent's premises for storage purposes and in order to arrange for their towing to a police pound in Polokwane. Further according to the First Respondent, the alleged theft of chrome was allegedly done or

orchestrated with the help of the First Applicant's Manager and that the proceeds of the alleged illicit theft of chrome was paid into the First Applicant's bank account. The First Respondent contends that it is for this reason, and on account of the investigations that are still ongoing, that the First Respondent is opposed to the release of the trucks. The trucks and trailers were removed from the Second Respondent's premises in Northam to the Police pound in Polokwane from 4 to 7 September 2020. All this happened without a warrant.

- [3] The First Respondent opposed the application on the basis that the application lacks urgency and secondly that the Applicants' application lacks merits to sustain the relief sought by the Applicants. The First Respondents, contend that the trucks and trailers were used in the commission of a crime and as a result were entitled to search, seize and continue to keep the trucks and trailers until the finalization of the criminal proceedings that are to follow. In essence the First Respondent raised a

defence of right. See **Diepsloot Residents' and Land Owners' Association and Another v Administrator, Transvaal 1994 (3) SA 336 (A) at 34SC.**

- [4] It is common cause that the legal basis of the Applicants' case is *akin* to a remedy of *mandament van spolie*. To succeed the applicant must show that it enjoyed possession, which is peaceful and undisturbed, of the trucks and trailers and that the Respondents deprived it of such possession forcibly or wrongfully against its consent. See **Yeko v Qana 1973 (4) SA 735 (A) at 739.**

- [5] It is the applicants' case that the removal of the trucks and trailers is unlawful to the extent that the police violated their possessory rights under the doctrine of *mandament van spolie*. A reference to the statement made by Mhlantla JA in the case of **Svetlov Ivancmec Ivanov v North West Gambling Board and 5 Others (312/2011) [2012] ZA SCA (31 May 2012)** will

help in understanding the applicants' cause of action. The learned Judge of Appeal said at page 12, para [19]:

"The historic background and the general principles underlying the mandament van spolie are well established. Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first, is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant – that is why possession by a thief is protected. The second, is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is

irrelevant as that would go to the merits of the dispute.”

See also: ***Nino Bonino v De Lange* 1906 TS 120 at 122.**

- [6] The duty to prove *mandament van spolie* falls on the applicant. See: ***Runsins Properties v Ferreira* 1982 (1) SA 658 (SECLD) at 669.** It is not in dispute that the Applicants were in possession of the trucks and trailers, what is in issue is whether they were deprived of their possession lawfully.
- [7] The First Respondent contends that the police actions are within the ambit of Section 20 of the Criminal Procedure Act, 51 of 1977, read with Section 22 of the Criminal Procedure Act. The main issue for consideration by this court is whether the trucks were seized by the First Respondent in compliance with the Criminal Procedure Act. It is common cause that the trucks

and trailers were seized without a warrant and will the First Respondent have to satisfy the requirements of Section 22 of the Criminal Procedure Act, which reads as follows:-

“Circumstances in which article may be seized without search warrant

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(b) if he on reasonable grounds believes

*(i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; **and** (own emphasis)*

(ii) that the delay in obtaining such warrant would defeat the object of the search.”

[8] In terms of Section 22 of the Criminal Procedure Act, the police are entitled to seize property without a warrant. In the circumstances of this case, some of the trucks were caught transporting stolen property, while others were caught in the act of theft within the mine premises. The Respondent's counsel argued that in terms of the provisions, in those circumstances, the police were entitled to take immediate action and seize the instrumentality used in the commission of crime.

[9] ***In Magoda v Minister of Safety and Security and Another; Mxhego v Minister of Safety and Security and Another (380/12) [2013] ZAECHMHC 5 (28 February 2013)*** the court held as follows at paragraph 15 and 16 thereof:-

"[15] The provisions of s 20 of the Act read:

"The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

1. *which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;*
2. *which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or*
3. *which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.”*

In essence the law recognizes that balance should be maintained between the rights of the police to conduct searches and seizures unhindered by the cumbersome procedural requirements relating to obtaining a search warrant and the rights of possession accorded to citizens under s 14(b) and (c) of the Constitution of the Republic of South Africa, 1996. These

subsections provide that everyone has a right to privacy, which includes the right not to have their property searched or their possessions seized. But the tension experienced in the exercise of maintaining balance of these rights makes the task of the courts a difficult one.

*[16] The Legislature enjoins the respondents to prove by credible evidence that the seizure of the Toyota and Nissan complied with the provisions of s 20 of the Act. That is, the scheme of Chapter 2 to the Act is such that even if consent to search a vehicle is obtained the ultimate seizure (dispossession) thereof must comply with the provisions of s 20 strictly. Failure on the part of the police to show that the seizure was in compliance with s 20 will render the seizure unlawful, and the removal of the vehicles from Blackhill to the police pound an act of spoliation entitling the applicants to restoration ante omnia regardless of the fact that they would not, at the time of search and seizure, have been entitled to possess them in terms of **s 68(6)(b)** of the **National Road Traffic Act 93 of 1996**, which provides:*

“No person shall – 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.””

- [10] In the circumstances it is for the respondents to show that the decision taken by the police to seize the trucks and trailers falls within the ambit of s 20 of the Act. The proper approach to be adopted in applying the section was considered by Didcott J in the case of ***Ndabeni v Minister of Law and Order and Another* 1984 (3) SA 500 (D and C.L.D.) at 511D-E**. The Learned Judge said:

“The second respondent, (that is the policeman concerned) no doubt thought that there were reasonable grounds for the belief he held. 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. Milne J once said "(T)here 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."

- [11] The law on warrantless searches and seizures is trite. Since the Police did not have a warrant they must prove that they had reasonable grounds to believe that a search warrant would be issued to them if they had applied for it to the magistrate or judge. This court is satisfied that the Police did indeed have reasonable cause to believe based on reasonable grounds that the trucks and trailers in question was concerned in the

commission or suspected commission of an offence and/or was intended to be used in the commissioning of an offence on the 13th of August 2020. See the case of **Hiya v The Minister of Safety and Security and Another Case No 506/99 TK**. This court is further satisfied, and it is not in dispute by the parties either, that the police had reasonable grounds to believe that a search warrant would be issued to them if they had applied for it on 13 August 2020. The First Respondent has therefore satisfied the first requirement as laid down in Section 22(b)(i) of the Criminal Procedure Act, but the issue still remaining is the second requirement in terms of Section 22(b)(ii) of the Criminal Procedure Act, which must also be satisfied. Both Section 22(b)(i) **and** Section 22(b)(ii) must be satisfied and not just the one or the other as the act clearly states “and” and not “or” in order for the search and seizure without a warrant to be lawful.

- [12] In light of the facts, as already stated here above, the trucks and trailers were searched and seized on the 13th of August

2020, but the actual dispossession only took place over a period of 3 days from 4 to 7 September 2020 when the trucks and trailers were removed to the Police pound in Polokwane. There is in my view no reason why the First Respondent could not between the period from 13 August to 4 September 2020 obtain a warrant from a judge or magistrate for the removal of the trucks and trailers. No explanation was given by the First Respondent either why a warrant could not be obtained. Bearing in mind the time lapse between the 13th of August 2020 to 4 September 2020, there is in my view no grounds for the First Respondent upon which the First Respondent can contend that the delay in obtaining such warrant would defeat the object of the search as per the requirement laid down in Section 22(b)(ii) and were there more than ample time to obtain such a warrant from a judge or magistrate in order to ensure that the seizure and actual removal of the trucks and trailers on 4 to 7 September 2020 is lawful.

- [13] The Full Bench in the case of **Sitonga v Minister of Safety and Security and 2 Others 2008 (1) SACR 376 (Tk)** at paragraph [37] held as follows:

“Whilst it may result in the applicant in spoliation proceedings being placed in possession of an article he or she may otherwise not lawfully possess, it should be borne in mind that the mandament van spolie affords no more than temporary relief. The respondent can, subsequent to the applicant having been restored in his or her possession, seek judicial dispossession, ejectment or other appropriate relief. Applied to the facts of the present matter, it is always open to the respondents to seek lawful dispossession of the vehicles in terms of the provisions of section 21 read with section 20 of the Criminal Procedure Act.”

- [14] Having regard to the fact to what was held in the **Sitonga case** *supra* the respondent can, subsequent to the applicants having been restored in his or her possession, seek judicial dispossession or other appropriate relief. *Having said that, in my view the same should apply to the fact that the First Respondents, knowing that the search and seizure was done*

without a warrant, could have sought judicial dispossession or other appropriate relief during the period from 13 August 2020 to 7 September 2020 in order to ensure that the First Respondents acted lawfully. The First Respondent's counsel argued that the search and seizure was done in only one continuous incident, on 13 August 2020, and that the actual dispossession on 4 to 7 September 2020 when the trucks and trailers were actually removed, should not be seen as a separate incident in that the search and seizure was complete on 13 August 2020 and the delay was only to arrange for transport and towing of the trucks and trailers to the pound in order to finalize the search and seizure process that already occurred on the 13th of August 2020. This argument in my view, is not correct. Although the search was conducted on the 13th of August 2020, the seizure was only done on 4 September 2020 and there is no reason why a warrant could not be obtained. I therefore find that the First Respondent failed to prove the second requirement in that the delay in obtaining a

warrant would defeat the object of the search (and seizure) and consequently the Respondents have failed to justify the seizure of the trucks and trailers on legal grounds. The act of spoliation is therefore proved and there is further no reason to allow the continued detention of the trucks and trailers by the First Respondent.

- [15] I was referred to the unreported **Eastern Cape High Court: Mthatha case of Eunice Feziwe Mbangi v The Minister of Safety and Security and Another, Case Number 862/09, delivered on 8 April 2010** by the Applicant's counsel wherein the court made an order that the vehicle in that case be made available to the police as and when it is required for the purposes of a pending criminal trial. Nhlangulela J granted such an order. Counsel for the Applicant in the present matter was amenable to such an order being granted in this matter as well on condition that specific arrangements be made with the Applicants and that such trucks and trailers be made available

for a specified period, dates and on specified times. I am inclined to grant such an order as it has been accepted practice that it may be so granted despite the law that in spoliation proceedings a thing spoliated must be returned to the possessor without any qualification. Had the Applicant's counsel resisted such practice being applied in this case, I would not be obliged to follow the practice at the expense of the well-established remedy of mandament van spolie.

- [16] There is no reason why the costs should not follow the event and in this matter be paid by the First Respondent only. The Applicant prayed for costs against the First Respondent and in the event of opposition by the Second and/or Third Respondents, in such event against the party opposing. Neither the Second, nor the Third Respondents opposed the application, and as a result no cost order is made against the Second and Third Respondents. The Applicant furthermore prayed for costs on an attorney and client scale. There is no

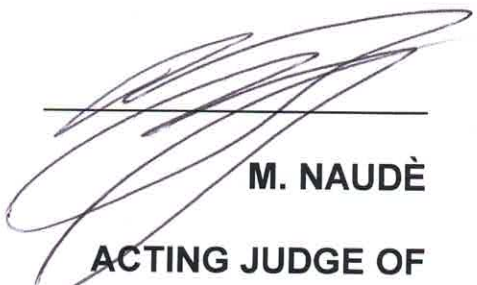
basis for such a higher punitive cost order to be paid by the First Respondent and no justifiable argument was advanced during the argument of this matter justifying such a punitive cost order, either.

[17] I therefore make the following order:-

1. The Applicant's non-compliance with the rules of this Honourable Court relating to notice and service and time limits be condoned and that the matter be heard as urgent in terms of Rule 6(12)(a);
2. The First Respondent is ordered to return the heavy delivery vehicles and side tipper trailers (*'the trucks and trailers'*) to the First Applicant, the relevant particulars of the trucks and trailers being as per prayer 2.1 to 2.24 of the Notice of Motion.
3. The First and Second Applicants be and is hereby interdicted and/or restrained or prohibited from disposing of or altering or

tampering with the trucks and trailers in any manner whatsoever pending the finalization of criminal proceedings already instituted, and the trucks and trailers as per 2 above to be produced to an investigating officer and the criminal court whenever the Applicants are required to do so, with at least 14 days prior written notice to the Applicants.

4. The First Respondent to pay the costs of the application on a party and party scale.



M. NAUDÉ
ACTING JUDGE OF
THE HIGH COURT

APPEARANCES:

HEARD ON: 16 OCTOBER 2020

JUDGMENT DELIVERED ON: 21 OCTOBER 2020

For the Applicants: Adv. L.K. Van Der Merwe

Instructed by:

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C/O Pratt Luyt & De Lange Attorneys

For the Respondent:

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