



REPUBLIC OF SOUTH AFRICA

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

REPORTABLE
Case number: 135/05

In the matter between:

**BASIE MOTORS BK
t/a BOULEVARD MOTORS**

Appellant

and

MINISTER OF SAFETY AND SECURITY

Respondent

CORAM: MPATI DP, SCOTT, CAMERON, NUGENT and HEHER JJA

HEARD: 3 MARCH 2006

DELIVERED: 28 MARCH 2006

Summary: Search and seizure – application in terms of s 31(1)(a) of the Criminal Procedure Act 51 of 1977 for return of vehicles seized by police in terms of s 20 – whether applicant may lawfully possess the vehicles – s 68(6)(b) of National Road Traffic Act 93 of 1996 prohibits possession, without lawful cause, of vehicles of which the engine or chassis

number tampered with – mere claim of ownership not enough to constitute 'lawful cause' and thus continued possession of such vehicles.

Neutral citation: This case may be cited as *Basie Motors Bk t/a Boulevard Motors v Minister of Safety and Security [2006] SCA 35 (RSA)*

JUDGMENT

MPATI DP:

[1] The appellant, a motor vehicle dealership from Pretoria, purchased two used Toyota Land Cruiser vehicles from one Mr Abdul Usman on 11 and 12 October 1999 respectively. The appellant was, on both occasions, represented by its manager, Mr Johannes Andries Booysen. Usman is alleged to be the sole director of a certain motor vehicle dealership in Gaborone, Botswana, and the owner of another motor vehicle dealership in Vereeniging, namely Pro Speed Motors. The vehicles were each priced at R325 000. It was agreed, in respect of each vehicle, that the appellant would make an initial payment of R200 000, the balance of the purchase price to be paid once a motor clearance had been obtained from the South African Police Service (SAPS). A police clearance certificate is required for re-registration of a vehicle.

[2] The first amounts as agreed were paid by separate cheques, dated 13 October 1999 and 22 October 1999 respectively, in favour of Pro Speed Motors. Clearance certificates were obtained by the appellant from the anti-theft unit of the SAPS, Pretoria West. The clearance certificates confirmed that the vehicles had not been reported as stolen in South Africa. Thereafter, the balance of the purchase price was paid, again by separate cheques dated 22 and 23 October 1999 respectively, in favour of Pro Speed Motors. The vehicles were, in turn, sold by the appellant; one on 21 October 1999 and the other on 26 January 2000. On 15 September 2000 one of the vehicles was seized from its new owner by Detective Sergeant Pienaar of the SAPS, who had discovered, upon inspection, that there had been tampering with its chassis number.

The warrant in terms of which this vehicle was seized states that the vehicle was required for purposes of proof of the commission of an alleged offence ('as getuienis by die bedoelde verrigtinge nodig is, en wat . . . tot bewys kan strek van die vermeende pleging van 'n misdryf').

[3] On 7 November 2000 the second vehicle was seized from its new owner by Inspector Rheeder. It had also been discovered, upon inspection of the vehicle at the premises of the appellant – arrangements had been made with the new owner to take it there – that there had also been tampering with its chassis number. According to the warrant of search and seizure, the seizure was done in terms of s 20 of the Criminal Procedure Act 51 of 1977 (the Act), the vehicle would be retained in police custody 'in accordance with section 30' of the Act, and the addressee (the appellant) is 'notified to prove, within thirty (30) days, the lawful cause why the engine and/or chassis number(s) of the vehicle in question had been tampered with failing to do so will have the effect that s 31 of [the Act] will be implemented'.

[4] Because of the seizure of the vehicles the appellant refunded the purchasers and 'ownership' of them reverted to it. The issue in this appeal is whether the appellant is entitled to possession of the vehicles.

[5] On 11 October 2000 the appellant's attorneys wrote to the respondent enquiring as to the progress of criminal investigations relating to the first vehicle and demanding its return within 30 days of the date of the letter, failing which a court order to such effect would be sought. A letter from the SAPS, in response, referred the appellant to the provisions of s 125 of the Road Traffic Act 29 of 1989 (Road Traffic Act), which rendered unlawful the possession of a vehicle of which the chassis number had been tampered with, defaced or falsified. (The Road Traffic Act was repealed by the National Road Traffic Act 93 of 1996 (National Road Traffic Act) with effect from 1 August 2000.) The letter further stated that the vehicle would be retained by the SAPS in terms of s 30 of

the Act until it may be dealt with in terms of s 31.

[6] When the return of the second vehicle was similarly demanded, the demand drew no response from the respondent. The appellant instituted motion proceedings in the Pretoria High Court for an order directing the respondent to forthwith return the motor vehicles to it, and for other ancillary relief. The respondent opposed the order sought, but RD Claassen J granted the order as prayed. He subsequently granted leave to appeal to the Full Court, which, by a majority (Motata and Shongwe JJ), allowed the appeal and substituted the decision of the court of first instance with one dismissing the application with costs. The further appeal is with the special leave of this court.

[7] The vehicles were seized in terms of s 20(b) of the Act, which authorizes the State to seize an article 'which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere'. The appellant's claim for the return of the vehicles is based on s 31(1)(a), which provides that if no criminal proceedings are instituted in connection with any article seized, the article shall be returned to the person from whom it was seized, if such person may lawfully possess it. The appellant avers in its founding affidavit, which was deposed to by Booysen on 11 March 2003, that a reasonable period has elapsed for the finalisation of any police investigation into the alleged theft of the vehicles – presumably inferred from the fact that the chassis numbers were tampered with – and for the institution of criminal proceedings.

[8] A senior superintendent in the SAPS, Martinus Jacobus Taljaard, deposed to the opposing affidavit on behalf of the respondent. He details therein the course of investigations by members of the SAPS, which revealed the involvement of syndicates in the alleged theft, on a large scale, of used vehicles from Japan. These vehicles are allegedly exported to Dubai, where changes to them, such as the alteration of chassis

numbers, are effected, whereafter they are further exported to various target countries around the world. Taljaard avers further that the two vehicles concerned in this matter were stolen in Japan and exported to the Republic via Dubai where their chassis numbers were altered. The allegation that the two vehicles were stolen in Japan is based on information, most of which admittedly being hearsay, which counsel for the appellant submitted should be struck out. As will become evident later in this judgment, it is not necessary to consider the admissibility or otherwise of the hearsay evidence. Suffice it to say that RD Claassen J excluded the evidence relating to the allegations of theft of the two vehicles on grounds that it was inadmissible hearsay, the respondent having failed to explain why affidavits alleging the theft had not been obtained from the original owners. The learned judge accordingly found that theft had not been proved hence the order for the return of the vehicles. The minority (Smit J) in the court below took the same view regarding the evidence of the alleged theft.

[9] Taljaard also refers in the opposing affidavit to the provisions of s 68(6)(b) of the National Road Traffic Act, which are in the following terms:

'No person shall –

- (a) . . .
- (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.'

(Emphasis provided.)

In terms of s 89 of the National Road Traffic Act a contravention of s 68(6) constitutes a criminal offence for which an accused is liable on conviction to a fine or imprisonment not exceeding a period of three years.

[10] The court of first instance did not consider the provisions of s 68(6) of the National Road Traffic Act. The minority (Smit J) in the court below did. He found that although Taljaard makes mention of the section in the opposing affidavit, the appellant

does not allege on oath that reliance was placed on it for the proposition that the appellant's possession of the vehicles would be unlawful. But Smit J held, in any event, that the respondent relied, insofar as the allegation of unlawful possession is concerned, only on the alleged theft of the vehicles in Japan; that the appellant states in its founding affidavit that it had purchased the vehicles bona fide; that before it in turn resold the vehicles, it established from the police that the vehicles had not been reported as stolen in South Africa; that it was only after it had established that fact that it proceeded to sell them, and that such conduct brought about the 'lawful cause' as contemplated by the section. The majority, on the other hand, said the following in this regard:

'It is possible that immediately after [the appellant] had purchased these vehicles [it] would have had a "lawful cause" but now that [it] is aware of the fact that the chassis numbers have been tampered with, [it] cannot be heard to raise the purchase of the vehicles as a lawful cause. It was argued that after the purchase of the vehicles the respondent approached the police to obtain a clearance which was issued to [it]. The said clearance only meant that no theft case had been reported on such vehicles. Understandably so, because if there was theft, it must have taken place in Japan and not in South Africa. On this basis alone the appeal must succeed.'

[11] In this court counsel for the appellant submitted that where a person in the position of the appellant was a bona fide purchaser of the vehicles and resold them in terms of a bona fide sale transaction, those sales constituted 'lawful cause' for their possession, firstly by the appellant and thereafter by the subsequent purchasers. In *Marvanic Development (Pty) Ltd v Minister of Safety and Security* (unreported judgment delivered on 20 March 2006 in case no 232/05), which was argued a day before the hearing of this appeal, Lewis JA, writing for the majority, said:

'[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 possession lawful.'¹

In that case the appellants had sought an order for the return of two trailers that had been seized when the police noticed that they had identical registration and chassis

¹ At para 8.

numbers. The appellants had argued that they were entitled to the return of the trailers since they had acquired ownership of them and thus had 'lawful cause' for their possession.

[12] In the instant case counsel for the appellant also argued that on a proper interpretation of s 68(6)(b) the onus is on the respondent to establish that the appellant's possession would be 'without lawful cause' were the vehicles to be returned to it. For this proposition counsel relied on the judgment of this court in *Minister van Wet en Orde v Datnis Motors (Midland) (Edms) (Bpk)*², in which it was held that an object (which had been seized) must be returned to the person from whom it had been seized unless that person's possession of the object would be unlawful, and that the State had to show on a balance of probabilities that possession of the object by such person would be unlawful. Lewis JA said the following in the *Marvanic* case, where reliance was also placed on *Datnis Motors*:

'In my view, 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". The phrase "without lawful cause" is not to be equated with the common law concept of *justa causa possessionis*. If it were, then the phrase would be superfluous, and there would be no means of preventing the possession of vehicles that had been tampered with by anyone who would otherwise have a right to them, such as an owner, pledgee or lessee. The very purpose of s 68(6) is to prevent possession until the position has been rectified. It is not simply to render the possession a criminal offence. If it were then the only person who would be affected by the section would be a thief, who would not in any event possess with lawful cause. The section would, if that were the interpretation, be meaningless.'³

[13] Farlam JA (Zulman JA concurring) disagreed with Lewis JA's conclusion regarding the interpretation of the subsection. The true position, he said, is that possession of a vehicle with false engine and chassis numbers 'without lawful cause' is unlawful and criminal, which means that 'in order to interpret subsection 6(b) one has to give a meaning to the words "without lawful cause": one cannot interpret subsection

² 1989 (1) SA 926 (A).

³ At para 10.

6(b) in a way which renders them superfluous'.⁴ He then agrees with the interpretation given by Jafta J to the phrase 'without lawful cause' in s 125(5)(b) of the Road Traffic Act (which is substantially re-enacted by s 68(6)(b) of the National Road Traffic Act) in *Dyani v Minister of Safety and Security*⁵, where the following was said:

'The phrase "without lawful cause" is not defined in the Act and therefore it must be given its ordinary meaning. Ordinarily, it may mean that the possession should not be contrary to the law. Put differently, that such possession must be permitted by the law or recognised by it. *In casu* the applicant claims the ownership of the motor vehicle in question on the basis that he purchased it from Mbambonduna. Attached to the founding affidavit is a copy of the written sale agreement between the applicant and Mbambonduna pertaining to the sale of the vehicle in question and such agreement was signed by both the seller and the purchaser. This, if established, may prove lawful cause for the applicant's possession of the vehicle provided Mbambonduna had authority to sell it.'

[14] It is well to remember that we are not here dealing with items that had been spoliated from the appellant. The two vehicles were seized by the SAPS on the strength of search warrants issued under s 20 of the Act and the claim for their return is based on s 31(1)(a). Ordinarily, therefore, and subject to questions of whether the vehicles are still required for the purposes for which they were seized, they should be returned to the appellant, but only if it may lawfully possess them (s 31(1)(a)). In this regard I agree with Farlam JA that the law as laid down in *Datnis Motors*⁶ relating to the return of an object seized under s 20 of the Act, has not been changed by s 68(6)(b) of the National Road Traffic Act as suggested by Lewis JA. Quite in line with what is now provided for by the subsection, Van Heerden JA said in that case:

'Gevalle waarin daardie persoon volgens 'n wetsbepaling nie die betrokke voorwerp mag besit nie, of dit nie mag doen sonder 'n vergunning, soos 'n permit, waaroor hy nie beskik nie, lewer geen probleme op nie. In sodanige gevalle sou sy besit van die voorwerp klaarblyklik wederregtelik wees indien dit aan hom teruggegee word. In die onderhawige geval het die appellante hulle nie op sodanige bepaling beroep nie.'⁷

[15] I agree, however, with Lewis JA that the mischief that the Legislature sought to prevent was the possession of vehicles where there has been tampering with engine or chassis numbers. The Legislature says that no person is to be in possession of a

⁴ At para 19-20.

⁵ 2001 (1) SACR 634 (Tk).

⁶ See footnote 2.

⁷ At p 933 G-H.

vehicle where there has been tampering with its engine or chassis number: such possession is forbidden.⁸ A person who possesses a vehicle of which the engine or chassis number has been tampered with is liable to a penalty (s 89(1), read with s 89(6)). And if that person is the owner, he/she cannot merely raise ownership as a defence in a criminal prosecution. If, for example, he/she knew that there had been tampering with the vehicle's engine or chassis number, a mere allegation of ownership of the vehicle would not earn him/her an acquittal. Something more would be required to constitute 'lawful cause' and thus for the owner to escape criminal liability. The appellant in this case relies on the fact that it was a bona fide purchaser (and thereafter owner), who even obtained clearances in respect of the vehicles from the SAPS. Although these factors, together with absence of knowledge of the tampering with, or alteration to, the chassis numbers of the vehicles might well have secured the appellant's acquittal had he been prosecuted, that would not have meant that he could continue to possess the vehicles. And lest I be misunderstood, I am not suggesting, by referring to what would constitute 'lawful cause', that there is an onus on a claimant to prove 'lawful cause'. In criminal proceedings the onus of proving absence of 'lawful cause' ('without lawful cause') is on the State.⁹

[16] Clearly then, the phrase 'without lawful cause' in s 68(6)(b) of the National Road Traffic Act is aimed, in my view, at affording a person who is facing criminal prosecution for possession of a vehicle whose engine or chassis number has been tampered with, an opportunity to raise a defence of lawful possession to escape criminal liability. It does not, where the possession was 'with lawful cause', provide authority for, or a right to, continued possession of such a vehicle. As I have said earlier, 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.

⁸ Compare *Dickens v Gill* [1896] 2 Q.B.D. 310, a case dealing with the phrase 'lawful excuse' in s 7(c) of the Post Office (Protection) Act, 1884.

⁹ See *Rex v Mguqu* 1927 PH (2) 85 (N); *Dyani v Minister of Safety and Security* 2001 (1) SACR 634 (Tk) at 640 para 16.

[17] As stated by Lewis JA (for the majority) in *Marvanic*, supra,¹⁰ Regulation 56 of the National Road Traffic Regulations 2000 provides the means for the owner of a vehicle (or a person otherwise entitled to possess the vehicle) to obtain from the police new engine or chassis numbers where these have been tampered with, and a police clearance in respect of such new numbers for purposes of obtaining, from the registering authority, a new registration certificate. Until that regulation has been complied with, possession of the two vehicles concerned in this matter will be without lawful cause, ie they cannot be returned to the appellant as it may not lawfully possess them (s 31(1)(a) of the Act).

[18] The appeal is dismissed with costs.

CONCUR:

L MPATI DP

CAMERON JA
NUGENT JA

SCOTT JA:

[19] I regret I am unable to agree with the construction placed on ss 68(6)(b) of the National Road Traffic Act 93 of 1996 by my brother Mpati. In my view the correct

¹⁰ At para 11.

meaning to be given to the subsection is that attributed to it by my brother Farlam in his dissenting judgment in the *Marvanic Development* matter to which reference is made in para 11 above.

[20] The two alternative constructions arise from the words 'without lawful cause'. Do they relate to the possession of a motor vehicle simpliciter or do they relate to possession of a motor vehicle whose engine or chassis number has been falsified etc ('a mutilated vehicle')? Farlam JA says the former is correct. The majority judgments in both cases say the latter. What particularly troubles me about the majority view is what I perceive to be a disregard of the words 'without lawful cause'. The subsection contemplates the possession of a mutilated vehicle which is lawful. If this were not so, the words 'without lawful cause' would not have been inserted. The section therefore gives rise to the question who may lawfully possess such a vehicle. The words could not have been inserted to protect the police because there is no similar protection in the other subsections of s 68(6) prohibiting possession of various things. No attempt is made by Mpati DP to provide an answer. The same is true of the judgment of Lewis JA in the *Marvanic Development* matter. On the contrary, the effect of both judgments is to construe ss 68(6)(b) as imposing an absolute prohibition on the possession of a mutilated vehicle. But the subsection clearly does not do so.

[21] In my view, therefore, one is driven to the interpretation of Farlam JA which is more in keeping with the common law and the rule that penal provisions are to be strictly construed. Indeed, the anomalies that would arise from the construction of the majority view are not difficult to imagine. Could it ever have been the intention of the legislature that an owner who recovers possession of his or her vehicle from a thief who has falsified the chassis number commits an offence in terms of the section? The owner, having recovered the vehicle, would be obliged in terms of the regulations to tender the vehicle to the police for the issue of a new chassis number and failure to do so would be an offence in terms of the regulations. But that is a different matter.

[22] As this is a minority judgment I do not propose to deal with the other issues in the appeal which were not addressed by Mpati DP.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

HEHER JA