THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 232/05
Reportable

In the matter between

MARVANIC DEVELOPMENT (PTY) LTD **First Appellant**

USEFUL TRADING 16 (PTY) LTD t/a VAAL BRICKS **Second Appellant**

and

MINISTER OF SAFETY AND SECURITY **First Respondent**

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Second Respondent**

Coram**:** Harms, Zulman, Farlam, Lewis JJA, Maya AJA
Heard: 2 March 2006
Delivered: 20 March 2006

Summary: Section 68(6) of the National Road Traffic Act 93 of 1996 prohibits the possession of vehicles where their engine or chassis numbers have been falsified. Where vehicles are seized by the police, the persons from whom they have been seized may not, where they are not prosecuted for any offence, claim return of the vehicles simply by reason of their ownership. Possession while the falsification still exists is 'without lawful cause.'

Neutral citation: This case may be cited as *Marvanic Development (Pty) Ltd v Minister of Safety and Security* [2006] SCA 20 (RSA).

JUDGMENT

LEWIS JA

[1] This appeal concerns s 68(6) of the National Road Traffic Act 93 of 1996 ('the Act'). Section 68 deals in general with unlawful acts in relation to registration plates, registration numbers and registration marks. Subsection 6 provides:

'No person shall –

(a) 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.'

In terms of s 89 of the Act a contravention of s 68(6) amounts to a criminal offence, rendering the accused liable on conviction to a fine or imprisonment not exceeding a period of three years.

[2] The appellants in the matter sought by way of urgent application against the respondents, the Minister of Safety and Security and National Director of Public Prosecutions, the return of two vehicles – heavy-load semi-trailers – that had been seized and impounded by members of the South African Police Services on 8 July 2004. The second respondent did not oppose the application. I shall refer to the first respondent simply as 'the respondent'.

[3] The Johannesburg High Court (Van Oosten J), relying on s 68(6), refused the application on the basis that the registration and chassis numbers of both vehicles had been falsified and that the return to the appellants would have entailed a contravention of s 68(6)(b) which requires that there be 'lawful cause' for the possession of any vehicle. The appeal lies with the leave of this court.

[4] The trailers were seized by the police from the premises of the second appellant, trading as 'Vaal Bricks', where a brick manufacturing plant is operated. The police had gone to the premises to search for stolen tyres. They noticed that the two trailers had the identical registration and chassis numbers. Further investigation revealed that although the trailers bore the chassis plates of the manufacturer, Henred Freuhauf, they were not Henred Fruehauf trailers.

[5] Criminal charges were laid against the appellants for being in possession of stolen property, and for fraud. These were subsequently withdrawn on the basis that there was insufficient evidence to prove the charges. The appellants claim return of the vehicles on the basis of s 31(1)(a) of the Criminal Procedure Act 51 of 1977 which provides that if no criminal proceedings are instituted in connection with any article seized it shall be returned to the person from whom it was seized. (The vehicles were presumably seized in terms of s 20 of the Criminal Procedure Act which permits seizure where articles are reasonably believed to have been

concerned with the commission of an offence, or evidence of one.)

[6] The appellants argue that they are entitled to return of the vehicles since they had acquired ownership of them: there is thus 'lawful cause' for their possession. They also claim a lien in respect of improvements effected by them to the vehicles. The High Court correctly found that there was no evidence of the improvements allegedly effected, and thus no lien. But even if that were not the case, one cannot have a lien over one's property, and the claim was not made in the alternative on the basis that the appellants were not the owners. I shall not deal further with the claim to a lien.

[7] There are several problems with the affidavits deposed to for the appellants. There is also a dispute of fact in respect of the vehicle claimed by the second appellant. I shall deal first, however, with the meaning of 'without lawful cause' in s 68(6) of the Act and its implication for the appellants.

[8] The appellants contend that simply by virtue of their ownership of the vehicles their possession would be lawful if the vehicles were returned to them. At the same time, they tell the court that the vehicle registration and chassis numbers were falsified by a foreman of the brickworks (who is nowhere identified) 'in an attempt to utilise the trailer economically'. They thus admit the deception and falsification, albeit claiming ignorance of the fact of falsification at the time of the seizure. But irrespective of their knowledge, it 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.

[9] The appellants rely on a number of decisions in which it has been held that where a criminal prosecution does not ensue, or is unsuccessful, after the seizure of property suspected to have been involved in the commission of a crime, the property must be returned to the person from whom it was seized. In particular, reliance was placed on *Minister van Wet en Orde v Datnis Motors (Midlands) (Edms) Bpk*[1] in which it was held that stolen vehicles must be returned to the people from whom they had been seized where the State has not proved on a balance of probabilities that the possession was not legal.

[10] These cases were decided, however, before the Act was passed.[2] 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

[1] 1989 (1) SA 926 (A). See also *Choonara v Minister of Law and Order* 1992 (1) SACR 239 (W) and *Booi v Minister of Safety and Security* 1995 (2) SACR 465 (O).

[2] *Tsiane v Minister of Safety and Security* 2004 (1) SACR 470 (T) was decided after the Act was passed, but without reference to it.

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.

[11] This does not mean that the appellants cannot recover the vehicles at all: it was common cause that they could have applied for what is termed a ‘SAPVIN’ number for each vehicle from the South African Police Services, and that when issued they would be entitled to possess lawfully. Regulation 56 of the National Road Traffic Regulations 2000 provides the means for a vehicle owner (or 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 will be issued to the registering authorities. The regulation itself shows precisely what s 68(6)(b) means: until the regulation has been complied with, possession by any person other than the police is without lawful cause. The appellants have apparently not applied to the police for new chassis numbers. The remedy is in their hands.

[12] There are other reasons why the appeal must fail. First, the deponent to the founding affidavit, a Mr Freitas, does not allege, let alone prove, the basis of his authority to depose to it in respect of either of the appellants. Secondly, the right of the second appellant to the vehicle claimed by it is in dispute: while Freitas alleges a sale to the second appellant, the respondent disputes that it is the owner. The vehicle is registered in the name of a different entity and the documents used by Freitas to show that the second appellant had purchased it reflect a different purchaser. Freitas does not deal with the respondent’s allegation in reply. Nor was there any reference to oral evidence to resolve the dispute. The first appellant’s claim to its vehicle is also suspect (it was registered in the first appellant’s name before the sale to the first appellant) but ownership of this vehicle is not disputed by the respondent.

[13] Accordingly the high court’s refusal of the application was correct.

[14] The appeal is dismissed with costs, including the costs occasioned by the use of two counsel.

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C H Lewis
Judge of Appeal
Concur: Harms JA
Maya AJA

FARLAM JA

[15] I agree that the appeal in this matter must be dismissed with costs and I agree in this regard with what is said in para 12 of the judgment of my colleague Lewis, which I have had the advantage of reading. I do not agree, however, with the conclusion to which she has come regarding the interpretation of s 68(6)(b) of the National Road Traffic Act 93 of 1996.

[16] At the outset it must be pointed out that s 68(6)(b) substantially re-enacts the provisions of s 125(5)(b) of the Road Traffic Act 29 of 1989, which it repealed. It is accordingly incorrect to say, as my colleague does in para 10 of her judgment, that s 68(6) was 'clearly designed to change the law' as laid down in the cases on which the appellant relied. It is true that they were all decided before the 1996 Act was passed (except for *Tsiane v Minister of Safety and Security* 2004 (1) SACR 470 (T) which was decided after the Act was passed but did not refer to it) but it must be borne in mind that it is also correct to say that (save for *Minister van Wet en Orde v Datnis Motors (Midlands) Edms Bpk* 1989 (1) SA 926 (A)) they were decided after s 125 (5) of the 1989 Act was already in operation and that they did not refer to it.

[17] Section 125(5)(b) of the 1989 Act was considered by Jafta J in *Dyani v Minister of Safety & Security and Others* 2001 (1) SACR 634(Tk) at 640f-i (para 17), 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.'

[18] In my opinion it is instructive to read s 68(6)(b) in conjunction with s 68(2)(b) and (3)(b). It is convenient at this stage to quote subsecs (2), (3) and (6) of s 68 in full. They read as follows:

'(2) No person shall –

(a) falsify or counterfeit or, with intent to deceive, replace, alter, deface or mutilate or add anything to a licence number or a licence mark or a similar number or mark issued by a competent authority outside the Republic; or

(b) be in possession of such number or mark which has been falsified or counterfeited or so replaced, altered, defaced or mutilated or to which anything has been so added.

(3) No person shall –

(a) falsify or counterfeit or, with intent to deceive, replace, alter, deface or mutilate or add anything to a certificate, licence or other document issued or recognised in terms of this Act; or

(b) be in possession of such certificate licence or other document which has been falsified or counterfeited or so replaced, altered, defaced or mutilated or to which anything has

been so added.

. . .

(6) No person shall –

(a) 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.'

[19] It will be seen that subsections (2)(b), (3)(b) and (6)(b) all create possession offences. Subsection (2)(b) and (3)(b) make it offences to possess a licence number, licence mark, motor certificate, motor licence or other document issued or recognised in terms of the Act which has been falsified, counterfeited, replaced, altered, defaced, mutilated or added to. Possession simpliciter of such a number, mark or document is penalised. On the other hand, subsection (6)(b) which deals with motor vehicles does not penalise possession simpliciter. It only penalises such possession where the possessor does not have lawful cause to possess. In my view it is not correct to say, as my colleague does in para 10 of her judgment, 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".' That paraphrase of the section is not correct.

[20] In order to interpret subsection (6)(b) one has to give a meaning to the words 'without lawful cause': one cannot interpret subsection (6)(b) in a way which renders them superfluous. If that had been the legislator's intention subsection (6)(b) would have read as do subsections (2)(b) and (3)(b). Parliament clearly recognised that where one is dealing not with numbers, marks and documents, which have no value in themselves, but with motor vehicles, which are valuable pieces of property, possession simpliciter could not be rendered unlawful and criminalised. The question that arises is: what possessors of what one may call mutilated motor vehicles did Parliament intend should not be hit by the prohibition contained in subsection (6)(b)? or, to put the question differently, what lawful cause had to be present so that possession of a mutilated vehicle would not be penalised? The difficulty arises from the fact that the subsection is ambiguous because the lawful cause referred to can be either cause simply to possess the vehicle concerned or cause to possess the vehicle in its mutilated state. I do not think that the latter is likely. Prima facie the only persons who would fall thereunder would be the police. But Parliament clearly did not think it necessary to provide for possession by the police in cases covered by subsection (2)(b) and (3)(b). In my opinion it is more likely that the legislator considered that provision had to be made for persons such as owners, pledgees or lessees in cases where engine and chassis numbers have been tampered with.

[21] Moreover it is not necessary to interpret subsection 6(b) in the manner suggested. This is because mutilated vehicles are covered by regulation 56(3)(e), (4), (5), (6), (7) and (8) of the National Road Traffic Regulations 2000 published in Government Notice R225 of 2000 (Government Gazette 20963 of 17 March 2000). These regulations came into operation on 1 August 2000, the

same day as the 1996 Act. The regulations require the 'title holder'[3] of a motor vehicle of which the chassis number or the engine number has been altered, defaced or obliterated to tender the vehicle to the South African Police Service (reg 56(4)). The 'title holder' must then cause the number issued by the Police to be cut, stamped, embossed on or permanently affixed to the vehicle (reg 56(5)(a)) and obtain a clearance from the Police in respect of the number so issued (reg 56(5)(b)). Provision is also made for the clearance to be furnished to the registering authority so that a new registration certificate can be issued (reg 56(7) and (8)). Failure by the 'title holder' to comply with his or her obligations under the regulation is a criminal offence (s 89(1) of the Act, read with the definition in s 1 of 'this Act', which includes the regulations).

[22] Furthermore it is in accord with the presumption against changing the common law more than is necessary (see, eg, *Dhanabakium v Subramanian* 1943 AD 160 at 167) and with the rule that penal provisions are to be construed strictly (see, eg, *R v Milne and Erleigh* (7) 1951 (1) SA 791 (AD) at 823B-F).

[23] I am unable to agree with my colleague that the regulation supports her interpretation of s 68(6)(b). On the contrary I think that it shows, as I have said, that it is not necessary to interpret the subsection as broadly as she has done because the mischief associated with the possession of what I have called mutilated vehicles is effectively combated by the regulation itself, which I have pointed out is backed by a criminal sanction. I am accordingly of the view that the interpretation given by Jafta J to the phrase 'without lawful cause' in s 125(5)(b) of the 1989 Act in *Dyani v Minister of Safety and Security and Others, supra,* was correct and applies to that phrase as it appears in s 68(6)(b) of the 1996 Act.

[24] In view of my conclusion that the appellants had to fail at the first hurdle, namely Freitas's authority to depose to the founding affidavit on behalf or the appellants, it is unnecessary to consider this aspect of the case further.

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IG FARLAM

JUDGE OF APPEAL

CONCURS
ZULMAN JA

[3] Ie 'the person who has to give permission for the alienation of [the] vehicle in terms of a contractual agreement with the owner of [the] vehicle; or the person who has the right to alienate [the] vehicle in terms of the common law and who is registered as such in accordance with the regulations': see definition of 'title holder' in s 1 of the Act.