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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 22254/2022

Date of hearing: 21 November 2022

Date delivered: 07 December 2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

07/12/2022

In the matter between:

KING OF THE ROAD TRANSPORT

1st Applicant

TIFOW ABDIWAHID OMAR

2nd Applicant

ALI HAJJI ADAN

3rd Applicant

And

MINISTER OF POLICE

1st Respondent

COMMANDING OFFICER: SAPS TRUCK

2nd Respondent

HIJACKING UNIT, GAUTENG

SERGEANT MATLALA: SAPS TRUCK

3rd Respondent

HIJACKING UNIT, GAUTENG

JUDGMENT

KEMACK AJ:

1. The applicants seek a *mandament van spolie*. The first applicant is a company involved in the transport industry. The second applicant describes himself as the sole proprietor of the first applicant. The third applicant (Ali Hajji Adan) is a driver employed by the first applicant.

2. The third respondent is Sergeant Matlala of the South African Police Service Truck Hijacking Unit in Gauteng, who is the investigating officer in respect of the incident which led to the seizure by the police of the items which form the subject of the *mandament van spolie*. The first and second respondents are cited in their capacity as the administrative and the executive authority responsible for the third respondent.

3. The applicants seek to reclaim possession of four seized items. They are an Argosy Freightliner truck with vehicle register number [...]; keys of a Volvo FH truck with vehicle registration number [...]; a Huawei P20 Lite mobile phone belonging to the third applicant; and a driver's licence belonging to the third applicant.

4. In his capacity as a member of the South African Police, the third respondent seized the Argosy truck on 16 March 2022 at Crown Mines, where a driver named Assad, employed by the first applicant, had left the truck after a delivery to a certain Aden (not to be confused with the third applicant, whose name is name is Adan). Assad had used the Argosy truck to collect goods from Aden's premises and delivered them to a purchaser in accordance with Aden's instructions, and received payment of R10 000 for the hiring of the Argosy truck.

5. On 16 March 2022, police officers including the third respondent, seized the truck where Assad had left it at Crown Mines, on suspicion that it had been used to take transfer of and thereafter deliver stolen goods procured in a truck hijacking in which a valuable consignment of Aquafresh toothpaste was stolen.

6. The first and second applicants deny knowledge of the truck hijacking and the prior theft of the toothpaste which the first applicant's Argosy truck transported, and blame Aden for hiring the first applicant's truck to transport stolen goods.

7. Nevertheless, on 16 March 2022 the second applicant requested Aden to attend at Crown Mines to investigate the reason for the police presence in the vicinity of the Argosy truck. Aden complied, and was arrested by the police who seized his mobile phone on which they found video footage of the offloading of the allegedly stolen toothpaste from the first applicant's Argosy truck. Counsel for both parties agreed that Aden's telephone allegedly containing footage of the transfer of the stolen goods from the Argosy truck, is not the Huawei mobile telephone which is reclaimed in this application

8. The third applicant, Adan, states that after transporting goods to Cape Town, he left the Volvo truck at the same Crown Mines depot on 15 March 2022, and returned on the morning of 16 March 2022 to collect the Volvo for another trip. When he arrived at the Crown Mines depot he found police officers standing around the Argosy truck. The third respondent searched the third applicant and found the Volvo keys, and the third applicant's Huawei mobile phone and driver's licence, all of which he seized from the third applicant.

9. There is no dispute that at the time of the seizure, the third applicant possessed the Volvo keys on behalf of the first applicant, and the Huawei mobile phone and his driver's licence on his own behalf.

10. The third respondent has not returned any of the seized items to the first and third applicants, and relies on alleged consent by the third applicant as a basis for justifying the seizure under section 22 of the Criminal Procedure Act.

11. It is necessary to consider section 22 of the Criminal Procedure Act in context with reference to sections 20, 21 and 31:

“20. State may seize certain articles. *The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as 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 whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

21. Article to be seized under search warrant.

(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued (a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or (b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence of such proceedings.

...

(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant.

22. 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

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

31. *Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings.*

(1) (a) If no criminal proceedings are instituted in connection with any article referred to in section 30 (c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it."

12. Section 20 of the Criminal Procedure Act permits seizure either under a section 21 warrant; or in the absence of a warrant under section 22(1) if the person searched consents to the search for and the seizure of the article in question, or in respect of a container or premises if the person who may consent to their search consents to such search and the seizure of the article in question. The third applicant denies consenting to the seizure of any of the four seized items.

13. Bearing in mind that the Huawei mobile phone seized from the third applicant is not the mobile phone containing the alleged record of the transfer of the stolen goods from the Argosy truck, none of the Volvo keys, driver's licence and mobile phone qualify as items eligible for seizure under section 20 of the Criminal Procedure Act, because there is no suggestion that the third applicant was involved in the hijacking and transfer of stolen goods to or from the Argosy truck; nor is there any suggestion that the Volvo truck and the third applicant's driver's licence and mobile phone had any connection whatsoever with the hijacking.

14. On that basis alone, the respondents had no lawful justification for seizing the Volvo keys, driver's licence and telephone, and they must be returned to the applicants' attorney without delay.

15. Significantly, Sergeant Matlala himself states in paragraph 30 of his answering affidavit that "*The keys of the Volvo were confiscated upon learning that it belonged to the second applicant. This was done as a last result to get the second applicant, who is a foreigner and refugee to avail himself for the interview with the police regarding the commission of a very serious crime*". There can be no clearer indication that the confiscation of the Volvo keys does not fall under the relevant sections of the Criminal Procedure Act, and was unlawful.

16. Regarding the seized Argosy truck, the third respondent relies on inadmissible hearsay evidence by referring to information given to him that the goods contained in the hijacked truck were offloaded into the Argosy truck at Aden's premises at [...] A [...] Street, with the second applicant reportedly in the vicinity. The third respondent states that he is in possession of a video showing all this, but for reasons not explained by the respondents, the video was not produced before the court.

17. The court considers reliance on hearsay evidence and an unproduced video to be insufficient for the respondents to satisfy the requirement in section 20 of the Criminal Procedure Act, that the Argosy truck was on reasonable grounds believed to be concerned in the commission or suspected commission of an offence.

18. There is more to the matter, however, since Aden's mobile phone containing the allegedly incriminating footage was seized from him after the second applicant had requested him to go to the Crown Mines depot to find out what was happening to the Argosy truck, and Aden then took the third respondent to a business named Drinkwater Cash and Carry where the stolen toothpaste was found in the possession of a person who stated that he had bought the toothpaste from Aden.

19. In the founding affidavit, the second applicant acknowledges being hired by Aden to collect and transport goods, and that he requested Aden to attend at the Crown Mines depot to investigate why the police were concerned with the Argosy truck. This is sufficient to create reasonable grounds for the third respondent to believe that the Argosy truck was concerned in the commission of the offence of taking receipt of and transporting the stolen goods from the hijacking.

20. In the absence of a search warrant issued under section 21 of the Criminal Procedure Act, section 22 of the Act only entitled the third respondent to seize the Argosy truck either with the consent of the persons entitled to give such consent, or if the third respondent on reasonable grounds believed that a search warrant would be issued on application and that the delay in obtaining such warrant would defeat the object of the search.

21. The third respondent does not make out any case for either believing that a search warrant would be issued as envisaged by section 22(b)(i) of the Criminal Procedure Act, or that a delay in obtaining such warrant would defeat the object of the search.

22. Rather, the respondents rely on the combined conduct of Aden and the third applicant (Adan) as a basis for satisfying the consent requirement in section 22(a) of the Criminal Procedure Act. There are, however, three reasons why this is not a valid defence.

23. First, neither Aden who was not employed by the first applicant, nor the third applicant who was employed as the driver of a different truck, qualify as being entitled on behalf of the first applicant to consent to the seizure of the Argosy truck.

24. Second, the respondents' allegations in support of consent by conduct, also do not satisfy the requirements set out in Magobodi v Minister of Safety and Security and Others 2009 (1) SACR 355 (Tk) to the effect that a person whose premises or property are to be searched must be informed of the purpose of the search. The respondents do not allege that this occurred. The same judgement states that in the absence of an entitlement under section 21(1) or 22(b) of the Criminal Procedure Act, "*the police official should, prior to requesting consent for the search, establish whether the person to whom the request will be directed has the capacity to consent and has physical control over the vehicle to be searched. If so, then such person should be informed of his or her right not to have the vehicle searched and also of his or her right to refuse to give consent for the search to take place*".

25. The affidavits in this matter disclose no evidence that the third respondent complied with these requirements.

26. During the hearing on 21 November 2022, counsel for the respondents handed up an *ex parte* order dated 8 September 2022, by Malindi J in this division under section 38(2) of the Prevention of Organised Crime Act, 121 of 1998. Paragraph 1.2 of this order is a preservation order in respect of a 2014 Freightliner Argosy truck, the registration number, vehicle identification number and engine number of which are set out in Malindi J's order.

27. The court understood counsel for the respondents to be requesting that this preservation order be treated as a defence to the application for restoration of possession of the Argosy truck which is the subject of this *mandament van spolie* application. No explanation was given for the respondents' delaying production of this order until the spoliation application was in the process of being heard, but the court accepted the handing up of the order and ruled that it be filed in the CaseLines record of this matter. This has been duly done by the respondents.

28. Malindi J's order does not serve as a defence in this application, because it deals with a different Argosy truck. The registration number, vehicle identification number and engine number of the truck identified in paragraph 1.2 of the

preservation order are different from the corresponding numbers for the Argosy truck in this application. The preservation order accordingly has no effect on the outcome of this application.

29. Under these circumstances, the applicants have made out a case for restoration of possession of all four items, and have been substantially successful in this application.

30. Prayers 2 (a), (b), (c) and (d) and 3 of the notice of motion are granted. The respondents are ordered to restore possession of the four items forthwith to the applicants' attorney.

KEMACK AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG

COUNSEL FOR APPLICANTS: Adv Mafoko

ATTORNEY FOR APPLICANTS: Leseka Attorneys

COUNSEL FOR RESPONDENTS: Adv Mashabane

ATTORNEY FOR RESPONDENTS: The State Attorney

DATE HEARD: 21 November 2022

DATE OF JUDGMENT: 07 December 2022