IN THE SUPREME COURT OF APPEAL

JUDGMENT

In the matters between:

Case No: 440/10

MASIXOLE PAKULE **Appellant**

and

MINISTER OF SAFETY AND SECURITY **First Respondent**

THE STATION COMMISSIONER,
MTHATHA CENTRAL POLICE STATION **Second Respondent**

Case No: 439/10

ARCHIE TAFENI **Appellant**

and

MINISTER OF SAFETY AND SECURITY **First Respondent**
THE STATION COMMISSIONER,
MTHATHA CENTRAL POLICE STATION **Second Respondent**

Neutral Citation: ***Pakule and Tafeni v Minister of Safety and Security*** **(440/10 & 439/10) [2011] 107 (1 June 2011)**

Court: NUGENT AND LEWIS JJA AND MEER AJA

Heard: 23 May 2011
Delivered: 1 June 2011
Summary: Search and seizure under ss 20 and 22 of the Criminal Procedure Act 51 of 1977 - police may lawfully seize items even where when first seized there was no ground for reasonable belief that item concerned in commission of offence - police may not return a vehicle to person from whom seized if that would be contrary to s 68(6)(*b*) of the National Road Traffic Act 93 of 1996.

ORDERS

On appeal from: Eastern Cape High Court (Mthatha) (Alkema J sitting as court of first instance in both cases):

Pakule v Minister of Safety and Security & another

The appeal is dismissed with costs including those of two counsel.

Tafeni v Minister of Safety and Security & another

The appeal is dismissed with costs including those of two counsel.

JUDGMENT

LEWIS JA AND MEER AJA (NUGENT JA concurring)

[1] In the Eastern Cape High Court, Mthatha, there have emerged two lines of cases that approach the application of sections 20 and 22 of the Criminal Procedure Act 51 of 1977 differently. Alkema J, in the two decisions before us on appeal, refers to these as 'two schools of thought' which have resulted in conflicting decisions. In granting leave to appeal in both cases he suggested that this court should resolve the conflict. This is particularly so because the one approach is endorsed in a decision of the full court: *Hiya v The Minister of Safety and Security & another.*[1]

[2] In brief, that case and others have held that where the seizure of an article is

1 *Hiya v The Minister of Safety and Security & another*, unreported , case no: 506/99.

not based on reasonable grounds in the first instance, the property – usually a vehicle – must be returned to the owner or possessor despite evidence discovered after the seizure that there are grounds reasonably to believe that the article has been involved in the commission of an offence, and despite the fact that no one may possess a vehicle which has been tampered with in various ways (a matter to which we shall return). In other decisions the view has been taken that where the initial belief, though at first not based on reasonable grounds, is subsequently well-grounded, the seizure is lawful and the police may retain the article.

[3] Alkema J said, in his judgment granting leave to appeal in Tafeni's case, that applications for return of a vehicle seized by the police are common in that court and that it is imperative that a definitive answer be provided so that there is consistency in the approach to the applications for return of an article alleged to have been unlawfully seized.

[4] It should be noted at the outset, however, that in both these cases the vehicles were in fact seized lawfully, in terms of ss 20 and 22 of the Act, and that the decisions did not turn on the question that this court has been asked to resolve. In our view it is nonetheless important to determine the proper approach to the issue raised by Alkema J.

[5] The sections of the Act central to the decisions are set out in full below.

Section 20 provides:

'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.'

Section 22 reads

'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.'

[6] In the first line of decisions it has been held that where there is no ground for believing, reasonably, that an article is concerned in the commission of an offence (or a suspected commission of an offence), at the time of the seizure, even

if such belief subsequently turns out to be warranted, then the seizure is unlawful and the article must be returned. In *Hiya*,[2] for example, the decision of the full court referred to, a police official received information that a vehicle suspected of being stolen was seen on the road. He obtained a warrant and seized the vehicle. After the seizure the vehicle was found to have suspicious features: a ground engine number and altered chassis number. A finding that the seizure of the vehicle fell within the purview of s 20 was set aside by the full court. The vague allegations by the policeman about information he had received which prompted the seizure were found not to suffice for a reasonable belief under s 20 of the Act. The release of the vehicle was ordered.

[7] The first approach has been based on a restrictive interpretation of ss 20 and 22, given that they allow for limitations on fundamental rights, entrenched in the Constitution. In *Magobodi*, for example, the court held that the rights to privacy and property were affected by the search and seizure provisions which therefore had to be limited.

[8] On the other hand, it has been held that where evidence of tampering with engine and chassis numbers is discovered, that in itself constitutes a reasonable ground for believing that a vehicle had been stolen. See, for example, *Mbutuma v*

2 See also *Magobodi v Minister of Safety and Security & another* 2009 (1) SACR 355 (TkHC); *Dyani v Minister of Safety and Security & others* 2001 (1) SACR 634 (TkD) and *Mnyungula v Minister of Safety and Security & others* 2004 (1) SACR 219 (TkHC).

The MEC for Safety and Security of the Eastern Province.[3] In that case, when looking for a vehicle suspected to be stolen at the applicant's premises, the police decided to inspect two other vehicles at the premises, and discovered the tampering. They seized the vehicles even though they had had no prior ground for suspecting that they were involved in the commission of an offence. Madlanga J said that it was 'common knowledge'[4] that engine and chassis numbers would be tampered with where it is intended that a stolen vehicle be sold intact. Such tampering would ground a reasonable belief that the vehicle has been stolen and would justify a seizure without warrant or the consent of the owner.

[9] Moreover, as pointed out by Alkema J, in granting leave to appeal in Tafeni's case, once vehicles have been seized, and it is ascertained that the engine and chassis numbers have been tampered with, the police may not return them even to the owner: ss 68 and 89 of the National Road Traffic Act 93 of 1996.

[10] I turn now to the facts in each of these appeals.

Pakule

[11] The appellant, Masixole Pakule, is a taxi operator in the district of Qumbu, Eastern Cape Province. During January 2008 Pakule's motor vehicle, a Toyota Hilux, was seized by members of the South African Police Services when it was found abandoned on the side of a road. Pakule applied to the Eastern Cape High

3 *Mbutuma v The MEC for Safety and Security of the Eastern Province* 1998 (1) SACR 367 (TkD).
4 At 370*b-e*.

Court, Mthatha for an order declaring the search, seizure and continued detention of his motor vehicle to be unlawful, and for its return. Alkema J dismissed the application.

[12] The uncontested evidence of Detective Inspector Mncwati, stationed at the Vehicle Identification Section and Safeguard Unit, Mthatha, was that Pakule employed Sithembiso Pakule as a driver of his taxi. He was wanted for armed robbery. The police received information that he was driving the vehicle concerned in the Marhambeni location.

[13] Inspector Phatakubi located the vehicle, the driver sped away and the police gave chase. The driver abandoned the vehicle next to the road and was pursued on foot by the police. The driver fired a shot at the police who returned fire and wounded him. He was arrested and returned to the vehicle. The vehicle was inspected by the police. They discovered that it had neither number plates nor a licence disc and that the driver was not in possession of a driver's licence. The vehicle was seized by the police. The driver was taken for medical treatment. After his arrest, he was charged with robbery. However, the vehicle seized was not suspected of being connected with the robbery.

[14] It was, however, discovered that the original chassis and engine numbers had been filed off and replaced with new numbers which were slanted and

appeared not to be stamped professionally. Enquiries were made about the identity of the motor vehicle to Toyota South Africa, and the vehicle chassis and engine numbers were referred to the Pietermaritzburg Licensing Authority for verification and confirmation. The investigations regarding the vehicle appear still to be pending.

[15] From the evidence it is clear that the vehicle was seized because of the absence of a license disc and number plates and because the driver was driving without a licence. This was immediately evident to the police officers before they seized the vehicle. These factors constitute contraventions of the National Road Traffic Act. Section 4(2) of that Act requires all motor vehicles to be registered and licensed. Section 12 provides that no person shall drive a motor vehicle on a public road without being in possession of a valid driver's licence. Section 68, among other things, relates to unlawful acts in relation to registration plates and numbers. Section 89(1) makes it an offence to contravene or fail to comply with any provision of the National Road Traffic Act. And s 89(2) provides for fines or imprisonment upon conviction, not exceeding six years.

[16] The failure to have number plates and licence disc, and driving without a licence accordingly all constituted criminal offences in which the motor vehicle was involved. There can be no doubt that the police officers who seized the vehicle had grounds reasonably to believe this to be the case. There would also in

the circumstances have been grounds reasonably to believe that if the facts recorded above were placed before a magistrate, a search warrant would have been issued under s 22(*b*) of the Criminal Procedure Act. The police officers who seized the vehicle were accordingly entitled to do so in terms of s 20 read with s 22(*b*) of the Act. The high court thus correctly refused the application.

Tafeni

[17] The appellant, a taxi operator in the Ngqeleni district, Eastern Cape was deprived of possession of his vehicle by members of the South African Police Services (SAPS). He applied to the Eastern Cape High Court, Mthatha for an order declaring the search, seizure and continued detention of his vehicle to be unlawful and for its return to him. Alkema J dismissed the application but gave leave, as we have said, to appeal to this court.

[18] The facts are largely not in dispute. On the afternoon of 14 January 2009 Captain Kwanini and Inspector Mtshengu, members of the South African Police Service, attached to the Vehicle Identification Section and Safeguard Unit, were on official duty at Ngqeleni Village, in the Eastern Cape. They noticed a white Toyota Hilux motor vehicle parked close by. Passengers were alighting from the vehicle. It appeared as if the white paint on the vehicle was superimposed over red paint and this aroused their suspicion that the vehicle might be stolen. The affidavit of Kwanini explained that both he and Mtshengu had attended a motor

vehicle identification course which equipped them 'with expert knowledge to be able to make a reasonable observation in respect of a suspiciously defaced vehicle'.

[19] They approached the driver of the vehicle, identified themselves as police officers and informed him of their suspicion that the vehicle he was driving was stolen, because of the white paint superimposed over the red. They asked the driver to accompany them to the police station where the vehicle would be inspected. He agreed but asked to be allowed first to drop off the remaining passengers at the taxi rank, which he did. Thereafter the police officers escorted the vehicle to the Ngqeleni police station.

[20] There, the driver identified himself as Lusindiso Nozintaba and said that the vehicle was owned by the appellant, Mr Tafeni, who employed him as a taxi driver. Captain Kwanini explained that due to their suspicions the police officials wanted to search the vehicle to investigate if it was an item liable to be seized by the State. Kwanini again asked Nozintaba for permission to search and the latter consented.

[21] The police officers opened the bonnet and discovered that the inner fenders were painted red whilst the body of the vehicle was white. They observed that the tags on the engine wall were not the original tags. It was clear to them that these

had been removed and other tags remounted onto the engine wall. An application of acetone revealed that the engine and chassis numbers had been interfered with. The spacing between the numbers was observed to be unequal and the numbers had been defaced. The engine numbers were hand punched as opposed to computer generated and professionally imprinted.

[22] Captain Kwanini telephoned Tafeni and asked him to come urgently to the police station. He was asked to produce documents proving his ownership of the vehicle but was unable to do so. He said he had bought the motor vehicle painted white from one Gxaba. According to Kwanini when it became clear that Tafeni could not prove ownership, he was informed that the law compelled them to seize the vehicle for further investigation, based on the discoveries which Tafeni could not explain.

[23] Kwanini informed Tafeni that the vehicle would not be released until he brought the previous owner to account for the irregularities on the vehicle. A statement was taken from Tafeni and the vehicle was towed away. Kwanini then filled in a seizure form. A subsequent inspection of the vehicle, by an expert from Toyota South Africa, confirmed that the motor vehicle had been tampered with in several material ways.

[24] Thereafter continuous requests for Tafeni to bring the previous owner of the

vehicle to the police to assist in the investigation came to nought. Ultimately the appellant was arrested and charged for unlawful possession of a motor vehicle. There are currently pending criminal proceedings against him. The vehicle is an exhibit in such proceedings.

[25] It is clear that at the time when the vehicle was seized (at the police station) the police had already discovered the evidence that grounded a reasonable suspicion (objectively) that it was concerned in the commission of a criminal offence. And indeed, Kwanini informed Tafeni at the police station that the law compelled them to seize the vehicle for further investigation, based on the discoveries they had made. Before then the vehicle had not been seized but driven by Tafeni's driver to the police station for the purpose of searching it. At the time the vehicle was seized, therefore, it had already been searched with the requisite consent as specified in s 22(*a*). The court below correctly dismissed the application for the return of the vehicle to Tafeni.

The principles applicable in both cases

[26] As we have said, in both the Pakule and Tafeni mattters, the seizures were lawful at the outset. On the assumption, however, that there were no grounds for a reasonable belief that the vehicles were concerned in the commission of an

offence (that is, that there was no compliance with s 20), we see no reason why, when the vehicle is in the possession of the police, and they ascertain that there are indeed such grounds for a reasonable belief that the item is concerned in the commission of an offence – such as the tampering with engine and chassis numbers – they should then not seize the vehicle lawfully. If that were not so, and they returned the vehicles to the alleged owners, they would be acting in contravention of the National Road Traffic Act. The police cannot lawfully release the vehicle to the owner or possessor: an order by a court that a vehicle be returned would defeat the provisions of the latter Act.

[27] Section 68(6)(*b*) of the National Road Traffic Act provides:

'(6) No person shall –

. . .

(*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(3) of that 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.

[28] In *Marvanic Development (Pty) Ltd & another v Minister of Safety and Security & another*[5] the appellants sought the return of two vehicles that had been

5 *Marvanic Development (Pty) Ltd & another v Minister of Safety and Security & another* 2007 (3) SA 159 (SCA).

seized by the police on suspicion that they had been stolen. The suspicion arose after it was found that the registration and chassis numbers had been tampered with. Criminal charges were laid against the appellants for being in possession of stolen property and for fraud, but these were later withdrawn. The appellants claimed the return of their vehicles on the basis of s 31(1)(*a*) of the Criminal Procedure Act 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. Their claim failed on the basis that s 68(6)(*b*) of the National Road Traffic Act prohibited them from being in possession of the vehicles even as owners. Lewis JA writing for the majority said:[6]

'[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.'

[29] That s 68(6)(*b*) does not permit the possession and consequently return of vehicles that have been tampered with, even to their owners, was again emphasised by this court in *Basie Motors BK t/a Boulevard Motors v Minister of Safety and Security*.[7] In that case too a claim by the owner under s 31(1)(*a*) of the Criminal Procedure Act for the return of a vehicle seized by the police failed. The

6 Para 8.
7 *Basie Motors BK t/a Boulevard Motors v Minister of Safety and Security* (135/05 [2006] ZASCA 35 (28 March 2006).

chassis numbering, it was discovered, had been tampered with. Mpati DP said:[8]

'[P]ossession 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.'

[30] More recently in *Absa Bank v Eksteen,*[9] another matter in which tampered chassis and engine numbers were revealed after a vehicle was seized by the police, Nugent JA stated, on the authority of *Marvanic*, that the seizure by the police under statutory authority, was not capable of being resisted. The fact that the owner might be capable of later acquiring the right to possession is immaterial.

[31] In the light of the decisions of this court there can and should no longer be any doubt that a vehicle seized by the police cannot be returned to persons from whom they have been seized if any of the features referred to in s 68(6) of the National Road Traffic Act are present.

[32] And, as we have said, even if a seizure (of a vehicle or any other article) was initially based on grounds that were not reasonable, where the police discover subsequently that there are indeed grounds for a reasonable belief that an article is concerned in the commission of an offence, they may then seize it lawfully. A return to the person from whom the item was seized would be an exercise in futility, bearing in mind that at the moment of return the article might lawfully be seized again.

8 Para 16.
9 *Absa Bank Ltd & another v Eksteen* (81/10) [2011] ZASCA 40 (29 MARCH 2011) paras 1 and 12.

[33] We consider therefore that Alkema J's approach to the application of ss 20 and 22 of the Criminal Procedure Act is correct, and that both appeals must fail.

[34] Orders

Pakule v Minister of Safety and Security & another

The appeal is dismissed with costs including those of two counsel.

Tafeni v Minister of Safety and Security & another

The appeal is dismissed with costs including those of two counsel.

_____
C H Lewis
Judge of Appeal

_____
Y S Meer
Judge of Appeal

APPEARANCES: *PAKULE*

APPELLANT: S M Mbenenge SC (with him A M da Silva)
Instructed by
Mvuzo Notyesi Inc,
Mthatha;
Matsepes Inc,
Bloemfontein.

RESPONDENTS: N K Dukada SC (with him M Gabavana)
Instructed by
C B Nguza & Associates,
Mthatha;
The State Attorney,
Bloemfontein.

TAFENI

APPELLANT: S M Mbenenge SC (with him A M da Silva)
Instructed by
Mvuzo Notyesi Inc,
Mthatha;
Matsepes Inc,
Bloemfontein.

RESPONDENTS: N K Dukada SC (with him L Matoti)
Instructed by
C B Nguza & Associates,
Mthatha;
The State Attorney,
Bloemfontein.