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**IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSKEI DIVISION)**

CASE NO: 202/ 2006

In the matter between:

**DOUGLAS THEMBENI MANINA**

**APPLICANT**

and

**MINISTER OF SAFETY AND SECURITY**

**1<sup>ST</sup> RESPONDENT**

**THE STATION COMMISSIONER  
CENTRAL POLICE STATION**

**2<sup>ND</sup> RESPONDENT**

(1) REPORTABLE YES/NO  
 (2) OF INTEREST TO OTHER JUDGES: YES/NO  
 (3) REVISED  
 13/05/2008  
 DATE  
 SIGNATURE

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**JUDGEMENT**

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**GREENLAND AJ**

**Nature of the proceedings**

[1] This is an application, as made clear by Applicant's attorney at the hearing, in terms of the possessory remedy provided by the *mandament van spolie*. In simple terms a person in peaceful possession of property who is dispossessed is entitled to approach the courts for summary relief to have possession restored. That the remedy can be availed against the State and its servants is correct in terms of *Donges NO v Dadoo* 1950(2) SA 321 (A) at 332.

**Background**

[2] Although there is a dispute on the papers as to the circumstances of dispossession Applicant's attorney has argued the matter on the basis of Respondents' version and has requested adjudication accordingly. In terms thereof a motor vehicle in the possession of Applicant was seized at a check point set up by members of the South African Police service (SAPS) on 21 July 2004. The seizure occurred during an operation titled "Operation Hunt" aimed at recovering stolen vehicles and illegally possessed firearms. The check point was set up at Qumbu Taxi Rank in Qumbu Village.

**Authority for check point**

[3] The check point was set up in terms of a written certificate of authority signed by Superintendent N. N. Sighola the Station Commissioner in charge of Qumbu Police Station.

The certificate is headed "ROADBLOCK/CHECK POINTS" followed by the title - "AUTHORIZATION IN TERMS OF SECTION 13(8) OF THE SOUTH AFRICAN POLICE SERVICE ACT, 1995 [ACT No. 68 of 1995]"

In terms thereof Detective Inspector Madyibi was given authority to set up a check point at "Qumbu Taxi Rank (Qumbu Village)" on "21/107/2004 during the time period from 9:00 to 14:00 and with the aim to check and recover stolen motor vehicles and illegal firearms"

Section 13(8) of THE SOUTH AFRICAN POLICE SERVICE ACT, 1995 [ACT No. 68 of 1995]" reads

**(8) (a) The National or Provincial Commissioner may, where it is reasonable in the circumstances in order to exercise a power or perform a function referred to in section 215 of the Constitution, in writing authorise a member under his or her command, to set up a roadblock or roadblocks on any public road in a particular area or to set up a checkpoint or checkpoints at any public place in a particular area.**

**(b) The written authorisation referred to in paragraph (a) shall specify the date, approximate duration, place and object of the proposed action.**

**(c) .....**

**(d) .....**

**(e) .....**

**(f) .....**

**(g) Any member may, without warrant-**

(i) in the event of a roadblock or checkpoint that is set up in accordance with paragraph (c), search any person or vehicle stopped at such roadblock or checkpoint and any receptacle or object of whatever nature in the possession of such person or in, on or attached to such vehicle and seize any article referred to in section 20 of the Criminal Procedure Act, 1977, found by him or her in the possession of such person or in, on or attached to such receptacle or vehicle: Provided that a member executing a search under this subparagraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation by the Commissioner concerned; and

(ii) in the event of a roadblock that is set up in accordance with paragraph (d), search any person or vehicle stopped at such roadblock and any receptacle or object of whatever nature in, on or attached to such vehicle and seize any article referred to in section 20 of the Criminal Procedure Act, 1977, found by him or her in, on or attached to such receptacle or vehicle: Provided that a member executing a search under this subparagraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, inform him or her of the reason for the setting up of the roadblock.

(h) .....

**Attack on the Certificate as a jurisdictional factor**

[4] Time was spent on what may be regarded as an attack on the validity of the certificate on what may be classified as technical grounds. Though technical the issues are of fundamental importance on account of the need to approach the issue restrictively as per par [5] c) below.

a) It was submitted more in hope than in faith that Superintendent N. N. Siquhola was not possessed of the requisite authority to issue the certificate. This point was put to bed by examination of the terms of a document included in the papers (NNS1) which in form and substance constitutes an express delegation of authority by the National Commissioner, Mr George Fivas, of SAPS to "every Provincial Commissioner.....Superintendent....and Station Commissioner" of "all the powers vested in" him as specified in a schedule attached. The schedule specifically includes, in terms of section 13(8)(a) of the SAPS Act, "the power to authorize a member to set up a road block ... or check point ... in as (sic) specified area."

The point is without substance as clearly the Station Commissioner was fully empowered in terms of express delegated authority and the strictures encompassed in the maxim *delegatus delegare non potest* need not detain.

b) It was similarly submitted that the terms of the certificate were too wide in that it specifies "Qumbu Taxi Rank (Qumbu Village)" as the place for the check point to be set up and as there are many taxi ranks in Qumbu the certificate stands to be struck down for vagueness.

The point is unsupported in the papers. The evidence of D/I Madyibi is that –

"The operation was conducted in a specified area, namely;  
Qumbu Taxi Rank at Qumbu Village..."

The only evidence before this Court is consistent with an identifiable and set location. This court has no information in terms of which it is able to conclude that there are many taxi ranks in Qumbu Village. It is not a matter on which a court can take judicial notice. What is relevant is that the certificate has specificity as regards the area and place where the check point was to be conducted.

Compare the case of *Nokwanda Sithonga and Minister of Safety and State Security*, Case No. A122/06, Tk, in which it was quite understandably held that for a certificate to refer to "scrap yards and mechanical workshops", was fatally vague.

c) It was also contended that the Station Commissioner of Qumbu, Superintendent Siquhola, had no power to authorise Detective Inspector Madyibi to conduct a check point as the latter was not a functionary reporting to him in terms of the Fivas delegation of authority only persons under Siquhola's command could be so delegated.

D/I Madyibi states that he is attached to the Mthatha Vehicle Identification Section and that in 21 July 2005 -

"was among a group of officers who were deployed at Qumbu Village, with the purpose of conducting a police operation known as "Operation Hunt."

There is no further information in the papers on this aspect. In particular this point was not listed and/or particularized as one of the grounds on

which the Applicant was seeking relief. Had it been the Respondents would have been able to explain the situation fully. As it is this Court has only the document of delegation from Commissioner Fivas which as far as can be made out approaches the issue of sub-delegation on the basis of "post levels" within "provinces". In terms thereof an officer of the rank of Superintendent has -

"the power to authorise a member in writing to set up a road block....or check point....." (my underlining)

As said the matter was not canvassed in the papers. Adv Melane's statement from the bar that the issue is resolved simply on the basis that D/I Madyibi was a member assigned to duties at Qumbu as that area does not have a vehicle identification section was unchallenged.

On the totality of the information before me I must conclude, as a matter of overwhelming probability, that D/I Madyibi is a member of the SAPS who fell under the jurisdiction of Superintendent Siquhola as regards "Operation Hunt".

d) It was also contended, (though not argued), by Applicant in his affidavit that the certificate is to be vitiated for authorizing - "the police to "recover" stolen motor vehicles which is not permissible in terms of the enabling legislation"

The certificate states that the check point was to be set up - "with the aim to check and recover stolen motor vehicles and illegal firearms."

The purpose of authorising roadblocks appears from the wording on sub-section (8) (a) - "...in order to exercise a power or perform a function referred to in section 215 of the interim Constitution, Act 200 of 1993".

These functions are the following:

- (a) the prevention of crime;
- (b) the investigation of any offence or alleged offence;
- (c) the maintenance of law and order; and
- (d) the preservation of internal security of the Republic.

A similar provision is contained in section 205 of the final Constitution, Act 108 of 1996.

Quite clearly the avowed purpose of "Operation Hunt" was to find stolen motor vehicles and unlicensed firearms an activity which clearly falls under the generic headings of (a) and (b) above, i.e., prevention and investigation of crime/offences.

To my mind the certificate, in terms of its technical attributes, was issued in compliance with the requirements set out in section 13(8) of the Police Act. That however does not dispose of the issue.

**Fatal *lacuna* re jurisdictional factor in Respondents' Case?**

[5] In simple terms it was argued strenuously that there is a glaring omission in Respondents' case particularised as follows.

a) Faced with a challenge as to the lawfulness of the seizure Respondents have provided a fairly exhaustive explanation of the occurrence and circumstances under which the vehicle was seized but have omitted the critically important element of the terms of the information received and to hand that provided the motivation for setting up the check point. It is claimed that the Respondents have confined themselves to going no further than stating that the operation was motivated by information which gave rise to a *bona fide* and reasonable suspicion regarding local possession of stolen vehicles and unlicensed firearms without disclosing the terms of the information.

To quote counsel on this point; "*what gave rise to the certificate was not information but conclusions*".

b) The starting point is to recognize the sacred provisions of the Constitution. The right to privacy is enshrined Chapter 2, The Bill Of Rights of the Constitution. Therein is Section 14 which reads:

- "14 Privacy**  
**Everyone has the right to privacy, which includes the right not to have-**
- (a) their person or home searched;
  - (b) their property searched;
  - (c) their possessions seized; or..."

There can be no doubt that a road block or check point constitutes an invasion of privacy in that its purpose is the indiscriminate stopping and

searching of persons in the hope of finding criminals or proof of criminality. In so far as this may breach section 14 of the Constitution such apparent breach is sanctioned under section 36 of the Constitution which provides –

**“36 Limitation of rights**

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

c) In the circumstances it is now trite that any statute invoking the limitation must be restrictively interpreted. Of particular relevance is – *MINISTER OF FINANCE AND OTHERS v RAMOS* 1998 (4) SA 1096 (C) at 1101 G – H –

“In this connection it should also be borne in mind that where a party opposing an application for a *mandament van spolie* relies upon a statutory provision in order to support an averment that he was entitled thereby to deprive the applicant of his possession, without recourse to due process of law, and that such deprivation or possession was therefore lawful, such statutory provision must be restrictively interpreted. A person who invokes the protection of such a statutory provision will need to establish that he acted strictly within its terms. (See *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997 (1)

**SA 526 (W) at 530F; George Municipality v Vena and Another  
1989 (2) SA 263 (A) at 271E–F.”**

d) It is therefore submitted that both as regards the issuing of the certificate to set up the road block and the actual seizure the failure by the Respondents to disclose the information providing the reason or motive for both is fatal to the validity of the certificate and to the actual seizure. Put succinctly the Respondents are necessarily constrained to bring the Court, as custodian of the rights enshrined in the Constitution, into their confidence and disclose the information so that the Court itself can determine whether or not the limitation of the right to privacy in this case was justified.

With that contention I am in wholehearted agreement. To leave the issue of such limitation within the private undisclosed discretion of individuals or entities would, in effect, emasculate the intention and spirit of the Constitution and leave sacred protections exposed to the whim of persons who may be driven by motives ranging from *mala fide* to *bona fide* but misguided.

**Finding on jurisdictional factors**

[6] Because the issue is so fundamental I propose to set out the relevant paragraphs in the affidavit of Inspector Madyibi which information he conveyed to the Station Commissioner who accepted the information in issuing the certificate –

- “10.2.1 There was a reasonable suspicion that there were stolen vehicles that were being operated at the area of Qumbu taxi rank.**
- 10.2.2 Such reasonable suspicion was further strengthened by information that people steal vehicles elsewhere and operate them at Qumbu taxi rank.**
- 10.2.3 As a result of the above, an operation hunt was set up at Qumbu to check and recover stolen vehicles.**
- 10.2.4 Indeed, the suspicion on reasonable grounds was vindicated because on that day of operation hunt the police recovered more than one stolen vehicles.”**

To my mind the nub of the matter is reflected in par 10.2.2 above which colours the other paragraphs. In terms thereof the police conducted

“Operation “Hunt” because they had information that vehicles were being stolen at other geographical areas and then used at Qumbu Taxi rank.

As terse as this information may appear, to my mind, the finding must be that the information provided was, on an objective test, reasonable for the issuance of the certificate and conducting “Operation Hunt”.

Obviously the information could have been amplified, e.g., volumes of vehicles involved; geographical regions etc.

Lacking in par 10.2.2 is the identity of the informant(s). It is trite however that an informant has a substantive right to non-disclosure of his/her identity. See for instance *SWANEPOEL v MINISTER VAN VEILIGHEID EN SEKURITEIT* 1999 (4) SA 549 (T); *SHABALALA AND OTHERS v ATTORNEY-GENERAL, TRANSVAAL, AND ANOTHER* 1996 (1) SA 725 (CC); *SHABALALA v ATTORNEY-GENERAL, TRANSVAAL, AND ANOTHER; GUMEDE AND OTHERS v ATTORNEY-GENERAL, TRANSVAAL* 1995 (1) SA 608 (T)

Lack of detail does not destroy the validity of the proposition that information that Qumbu Taxi rank was being used as a venue for stolen vehicles was a good reason to issue the certificate and mount the operation. In the circumstances I find that the validity of certificate and the seizure of the vehicle must be upheld provided there was compliance with section 20 of the Criminal Procedure Act, Act No. 51 of 1977.

#### **The seizure**

[7] I propose to first set out the relevant statutory provision –

a) Section 20 of the Criminal procedure Act provides –

#### **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.**

- c) When the Applicant's vehicle was stopped at the check point it was discovered that the engine number had been ground off and re-stamped with another number. So too as regards the chassis number. However as regards the latter the officer found an untampered chassis number on the inner panel of a door which did not match the "re-stamped" number. A check on the police computer system revealed that the vehicle had been reported stolen at Mowbray, Cape Town. He therefore informed the Applicant that he was arresting him for being in possession of a vehicle suspected of being stolen and proceeded to impound (seize) the vehicle.
- d) According to the affidavit of Inspector Lungile Mnyakaza whose office is responsible for the issuance of "TP" identification numbers and who has received training on the issuance of "TP" identification numbers for vehicles the "TP" numbers found re-stamped on the vehicle were not issued by the office in which he is employed. He advised D/I Madyibi of this fact on 26 August 2004 and this contributed to the decision to seize.
- e) It is quite difficult to imagine a more appropriate case in which seizure of a vehicle is justified as envisaged by section 20 of the Criminal Procedure Act and in particular subsection b) thereof. The engine and chassis numbers of the vehicle had been ground off and replaced with new "TP" numbers which, according to police identification records, were false. Furthermore Respondents specifically challenged Applicant to provide proof and evidence of the vehicle identification centre that must have checked this vehicle and issued him with a clearance certificate. Apart from claiming to have been issued with a clearance certificate Applicant has not produced the certificate. Instead he has produced, in his third affidavit, a printout which he claims is a "copy of a police printout which shows that the vehicle is not stolen and was registered in my name in 2003". No Registration Certificate is attached. Neither is there a police clearance. One can only surmise as to the

authenticity of this document which bears no attributes of authenticity such as a SAPS stamp.

- f) I am in full agreement with the police witnesses that for this Court to set aside the seizure would severely shake public confidence in the administration of criminal justice and undermine the police in their efforts.
- g) I do not think that the submission that the vehicle was not one liable for seizure has any merit and hold that the unreported judgements to which I was referred are distinguishable, being relevant only if one indulges in obfuscation of the simple facts of this matter.

In all the circumstances it is my finding that the Respondents have discharged the onus of showing that the seizure was lawful and that the remedy under the *mandament van spolie* must fail.

#### **Continued detention of the vehicle**

[8] The seizure occurred on 26 August 2004. It is now May 2008. Nearly four (4) years have elapsed and the exact status of this vehicle remains unresolved. The Applicant claims to have valid identification papers for the vehicle. The police allege that these are false. A charge of theft of the vehicle has since been withdrawn. The police have still not had a complainant identify the vehicle as stolen. The whole situation is now one of limbo.

In the notice of motion Applicant also seeks an order that Respondents be ordered to "forthwith release the motor vehicle to Applicant." As stated this prayer was supported on the basis of an unlawful seizure.

- (a) It seems to me that if the vehicle numbers are false than the Applicant's situation is to be resolved in terms of the decision of *MARVANIC DEVELOPMENT (PTY) LTD AND ANOTHER v MINISTER OF SAFETY AND SECURITY AND ANOTHER 2007 (3) SA 159 (SCA)* the effect of which is set out in the head note –

"So long as the falsification of a chassis or engine number exists, possession by anyone, including the owner, of the vehicle bearing that falsification is 'without lawful cause' for purposes of s 68(6)(b) of the National Road Traffic Act 93 of 1996. The owner is therefore not entitled to the return of the vehicle, in terms of the provisions of s 31(1)(a) of the Criminal Procedure Act 51 of 1977,

on the ground that no criminal proceedings have been instituted in connection with the vehicle, until such time as he has been issued with a new chassis or engine number under the National Road Traffic Regulations and with a police clearance certificate by the registering authorities.”

In these papers the evidence of falsity is clear and convincing.

(b) If however the vehicle is in fact not stolen and the numbers not false than the Applicant has a remedy for the return of the vehicle under the *rei vindicatio*. See *VAN DER MERWE AND ANOTHER v TAYLOR NO AND OTHERS 2008 (1) SA 1 (CC)* at 13 -

“[22] An action based on the *rei vindicatio* is available to an owner<sup>25</sup> who has been deprived of his or her property without consent and who wishes to recover it from the one who retains possession.<sup>26</sup> In order to succeed with any vindicatory action, generally in addition to ownership, the applicant also has to prove that the property was in possession of the respondent at the beginning of the proceedings and that the property in question is still in existence and is clearly identifiable.

<sup>25</sup> *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A)* at 81 - 82.26

<sup>26</sup> See *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd 1999 (2) SA 986 (T)* at 995I - 996D; *Chetty v Naidov 1974 (3) SA 13 (A)* at 20C; *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours 1958 (3) SA 285 (A)* at 297E; *Sorvaag v Pettersen and Others 1954 (3) SA 636 (C)* at 639G and 641B.

Certainly if it were the position that the Respondents accepted that the Applicant is the owner of the vehicle, and that the identification numbers were not false, it may have been open to this Court consider whether or not relief under the *rei vindicatio* should be afforded in the circumstances. The obvious problem is that there is a complete dispute of fact on the issue of ownership and there is clear evidence of falsity as regards the identification numbers.

Applicant was well aware of Respondents' opposition to his claim to title. Because of their resolve Applicant found it necessary to file no less than three affidavits in this matter. He chose to invoke the remedy of *mandament van spolie*. This remedy is nearly always invoked for the purposes of immediately and summarily restoring the *status quo ante*

when there has been dispossession. This case would appear to be, in effect, and action under the *rei vindicatio* clothed with attributes of the *mandament van spolie*.

Having found that the seizure was not unlawful this Court can only order the return of the vehicle if it were satisfied that Applicant was/is owner and that the continued detention of the vehicle by the Respondents is unlawful. On the papers it is neither appropriate nor possible to make such findings.

**Order**

[9] In the circumstances it is ordered that –

**The application is dismissed with costs.**



GREENLAND AJ

<b>DATE HEARD:</b>	<b>09 MAY 2008</b>
<b>JUDGMENT DELIVERED:</b>	<b>13 MAY 2008</b>
<b>FOR APPLICANT:</b>	<b>MR M NOTYESI</b>
<b>INSTRUCTED BY:</b>	<b>MVUZO NOTYESI INC 2<sup>ND</sup> FLOOR T. H. MADALA CHAMBERS 14 DURHAM STREET MTHATHA</b>
<b>FOR RESPONDENT:</b>	<b>ADV T H MELANE</b>
<b>INSTRUCTED BY:</b>	<b>THE STATE ATTORNEY C/O MBULELO ATTORNEYS OFFICES 230 -231 TRACO BUILDING MTHATHA</b>