

IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1513/1996

In the matter between:

Benson Zulu

Plaintiff

vs

Attorney General & Another

Defendant

CORAM

S.W. SAPIRE, ACJ

JUDGMENT

(21/2/97)

The applicant, Benson Zulu, who is the owner of a motor vehicle, namely a Mazda 323 Sedan registration No SD 623 AG claims delivery to him of the motor vehicle presently in the possession of the Second Respondent. In August 1994 he reported the theft of the vehicle to the Police, who recovered the vehicle and informed the Applicant of their success. The police have adopted a policy of not returning stolen motor vehicles which have been recovered and which are in their possession, save in terms of an order of this court. In the majority of cases the application is referred to the first respondent who, presumably after investigation, consents to an order for return of the vehicle to the Applicant

In the present case which is such n application, matters are complicated by the intervention of Jameson Masuku who claims that he bought the vehicle from Themba Zulu a motor mechanic employed at Bonelela Garage Sidwashini on the 14th August 1994 for E2 500,00 He has attached an invoice reflecting the sale to the affidavit filed in support of his intervention in these proceedings.

At the time of the sale Masuku required proof from the seller of the latter's right to sell the vehicle and was told that the registration documents which he produced had been given to him by the owner to enable him to effect a sale of the vehicle. On the strength of this assurance Matuku bought the vehicle.

2

ZULUVAG2.WPD

The vehicle when bought by Masuku lacked an engine and other parts. At the cost to him of some E4 500, he had the vehicle restored to working and serviceable condition. Within a month of the purchase of the vehicle the Applicant claimed the vehicle as his

There is some difference as to whether the applicant reported the car as stolen before or after he tried to retrieve it from Masuku. It is clear however that in August 1994 the vehicle was taken by the police from Masuku in whose possession it then was Not so clear is what right they had to dispossess Masuku.

In the course of argument this point was not raised. It seems to me that the right of police to seize property is governed by section 52 of the Criminal Law and Procedure Act 67/38. This section provides that if on the arrest of any person on a charge of an offence relating to property, the property

in respect of which the offence is alleged to have been committed is found in the possession of the arrested person the person making the arrest is to deliver it to the magistrate as soon as possible. I have not been able to find any statutory provision entitling the police to take possession of movables from the bone fide possessor thereof. Masuku has never been charged with the theft of the vehicle and he has certainly not been arrested so that the provisions of Section 52 do not apply.

This being so the merits of the rival claimants to the vehicle are irrelevant and the police are obliged to return the vehicle to the possession of the person from whom they took it.

The Applicant is not assisted by the provisions of Section 16 of the Theft of Motor Vehicles Act 16/91.

While it is true that the vehicle was found in Masuku's possession he was not arrested in terms of the section, presumably because the police did not have reasonable grounds to suspect that he had stolen the vehicle or received it knowing it to have been stolen. The police therefore had no right to have seized the vehicle in the first place, but having done so should have returned it to him, immediately it became clear that Masuku had committed no offence in connection with the vehicle.

The conclusion to which I have come is in accordance with the decision in MINISTER VAN WET EN ORDE v ERASMUS EN 'N ANDER 1992 (3) SA 819 (A) the head note of which reads as follows:

"Both respondents had bought vehicles under the impression that the seller was legally entitled to dispose of them. After the respondents had both gone to considerable expense to effect necessary or useful repairs to them, the vehicles were seized in terms of S 20 of the Criminal Procedure Act 51 of 1977. Criminal proceedings instituted in connection with the alleged theft of the vehicles were, however, withdrawn, and consequently the provisions of S 31(1) of the Act came into operation. Section 31 (1 )(a) provided that where an article was not required for criminal proceedings, it shall be returned to the person from whom it was seized, provided that such person may lawfully possess the article in question; and S 31(1)(b) provided that, if no person may lawfully possess the article or the police do not know of any person who may lawfully possess it, it shall be forfeited to the State. The respondents' request that the vehicles be returned to them was refused by the police. A Provincial Division granted respondents' claim for the return of the vehicles. It was common cause that the vehicles in question were stolen objects and that no person except the parties to the

3

ZULUVAG2.WPD

instant case had laid claim to them. The Court a quo upheld respondents' claim on the basis that, as a result of the repairs they had effected to them and their consequent increase in value, the respondents had acquired liens over the vehicles and could accordingly lawfully possess them. On appeal it was contended for the appellant that, inasmuch as lawful possession in the context of S 31 (1) meant the possession of an owner or of someone who had derived his right of possession from the owner, the respondents' possession would not be lawful if the vehicles were to be returned to them.

Held, that, when the holder of a lien (*ius retentionis*) lost possession of the thing as a result of violence or theft, the common-law rule that movables cannot be followed up no longer applied: in such circumstances the holder could vindicate the movable in question.

Held, further, that there was no reason to distinguish between loss of possession as a result of violence and such loss as a result of legal compulsion.

Held, further, that inasmuch as the respondents' loss of possession had been as involuntary as it would have been had they been violently deprived thereof, they would in the absence of the

provisions of s 31(1)(a) have been entitled to have the vehicles returned to them.

Held, further, that respondents would in such circumstances have been entitled to exercise their liens against, inter alia, the owners of the vehicles in question.

Held, further, that for the purposes of s 31(1)(a) the legality of the possession of an article had to be judged with reference to the criminal law, so that the possessor was entitled to be restored in his possession unless such possession was unlawful according to criminal law.

Minister van Wet en Orde en 'n Ander v Datnis Motors (Midlands) (Edms) Bpk J 1989(1) SA 926 (A) applied.

Held, further, that it followed from the above that, if it was not unlawful for the person concerned to possess the article, it was irrelevant whether or not his earlier possession had resulted from an agreement with the owner of the article.

Held, further, that the respondents had before the seizure been entitled to exercise their liens against, inter alia, the owners of the vehicles (even if they had known that the vehicles were stolen): they would therefore be able to similarly exercise their revived liens should the vehicles be returned to them in terms of s 31(1)(a).

Held, accordingly, that the return of the vehicles to the respondents was not unlawful, and that the appeal had to be dismissed.

The decision in the Orange Free State Provincial Division in Erasmus en 'n Ander v Minister van Wet en Orde 1991 (1) SA 453 (O) confirmed.

Although the statutes concerned are not identically worded to our local statutes to which I have referred the principle to be applied is clear. The Police must return the vehicle to the party from whose possession it was taken, if his possession is not unlawful. The applicant will be free to pursue his civil claim for delivery of the vehicle against which the intervening party may raise his claim to a lien. This is the course which should have been followed in the first

4

ZULUVAG2.WPD

place... Accordingly

- a) the Application is dismissed with costs, and
- b) an order is made on the counter application directing the Commissioner of police to deliver the vehicle, being Mazda 323 sedan 1983 model Registration number SD 623 AG to the intervening party.

S. W. SAPIRE

ACTING CHIEF JUSTICE