



IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 3050/98

In the matter between

GIYANI DLAMINI

APPLICANT

And

THE COMMISSIONER OF POLICE

1ST RESPONDENT

THE ATTORNEY GENERAL

2ND RESPONDENT

Coram
For Applicant

S.B. MAPHALALA – J
ADVOCATE THWALA
(Instructed by Maphalala
& Co)

For Respondents

ATTORNEY GENERAL

JUDGMENT (18/04/2000)

Maphalala J:

The matter was brought by way of motion in the long form for an order directing the first respondent to restore the applicant possession of a motor vehicle, a Nissan Skyline, Registration No. SD 257 LM directing first respondent to pay costs of this application and further and or alternative relief.

The application is in the nature of spoliation where the applicant alleges that at all material times and in particular on or about the 25th August 1998, he was wrongfully deprived of possession of the motor vehicle by police officers based at Manzini Regional Headquarters on suspicion that it was stolen. At the time the motor vehicle was taken it was parked at KaKhoza location in the custody of one Sibusiso Dlamini, who was taking care of it because it had some mechanical faults. The applicant further alleges that the manner in which it was kept at the Police Regional Headquarters in Manzini will expose it to rust and serious internal damage resulting in its depreciation as it is parked in an open yard. The seizure is unlawful and the continued detention of the motor vehicle is wrongful and without any lawful justification.

The respondent opposes this application and they have taken the view that they deny that applicant was in lawful possession of the motor vehicle. The motor vehicle was seized in order to conduct investigations because the police suspected it to be a stolen motor vehicle. Respondents went further to reveal in their answering affidavit the results of their investigations. It was established at the Central Motor Registry that the motor vehicle no. SD 257 LM is registered under the name of one Dumsile P. Nsibandze. Further the model, type, engine number and chassis number all do not correspond with those of the car claimed by applicant. On further investigations the police found that a Nissan Skyline registered SD 257 LM is a 1988 model grey in colour and whose engine number is incomplete and chassis number removed.

Essentially, the respondent take the view that the motor vehicle was seized in terms of the *Theft of Motor Vehicle Act No. 16 of 1991*.

The matter then came for arguments. Advocate Thwala for the applicant argued strenuously that there is no doubt that the applicant was in possession of the motor vehicle and that he was dispossessed by the first respondent on the pretext that the vehicle in question was stolen and in doing so the first respondent wrongfully relied on the *Theft of Motor Vehicle Act*. The Act does not permit the police to go about detaining the vehicles of the citizens if they do not at the same time institute criminal proceeding under that the Act such that the fate of the vehicle is determined by the court at the end of a criminal trial. In the present case no criminal proceedings have been instituted to justify the suspicion that the vehicle is stolen. The vehicle as a result is wrongfully and unlawfully in the hands of the police. Mr. Thwala went at great length to outline the law applicable in spoliation proceedings. I am not going to repeat his submissions, as most of his arguments on points of law in this area of the law are trite.

On the other hand it was argued on behalf of the respondents that applicant relies on the common law. That in the present case a statute is applicable and it supersedes the common law position. The motor vehicle was seized in terms of Section 4 of the *Theft of Motor Vehicle Act No. 16 of 1991* read with Section 16 of the said Act.

Section 4 (1) create a presumption that unless the contrary is proved by him, a person shall be presumed to have committed an offence under Section 3 and on conviction, punished accordingly if:

“.....(a) He is found in possession of a motor vehicle which is reasonably suspected to be stolen (my emphasis);

(b)

(c)

(d)

Further Section 16 (1) empowers any police officer to search and arrest without a warrant any person found in possession of a motor vehicle if he has reasonable grounds to suspect that person has stolen that motor vehicle or has received that motor vehicle knowing it to be stolen or has assisted in the stealing of that motor vehicle and

shall seize from that person the motor vehicle and any document in relation to that motor vehicle.

These are the issues before me. Before proceeding to determine them I wish to state that a week after hearing arguments in this matter and judgement reserved it came to the court's notice that certain motor vehicle kept at Lobamba Police Station under the Act were burnt by a fire whose origin was a mystery. In view of this development and I requested the representative from government to ascertain whether the motor vehicle which is the subject matter of this case was one of those burnt in this inferno. I was motivated to make this enquiry following the dicta *Potgieter vs Davel 1966 (3) S.A. 555 (o)* where it was propounded that in circumstances where it is objectively impossible to restore possession of the spoliated thing the mandament cannot be instituted and the claimant will have to look for other remedies. Although the courts differ as to when restoration is actually impossible, the weight of authority supports the view that *mandament van spolie* will not succeed where the spoliated thing is destroyed, materially damaged or alienated to a bona fide third party.

I was later informed by the parties that the motor vehicle was burnt together with the others kept there. I put it to counsel that it seem to me to be moot to proceed and determine the issue of spoliation but was persuaded by defence counsel to proceed more particularly to deal with the powers of the police in terms of the Act.

I now proceed to determine the issue. It is trite law that if the applicant succeeds in proving peaceful and undisturbed possession at the time of deprivation and that the respondent committed an act of spoliation, the court will summarily restore the *status quo ante* and will do that as a preliminary to any investigation into the respective rights of the parties prior to the act of spoliation. (See *Nino Bonino vs Delance 1906 T.S. 122 at 125*). It appears to me from the reading of the *Theft of Motor Vehicle Act No. 16 of 1991* that the respondent had the power to seize and detain the motor vehicle at the material time in terms of Section 4 (a) (1) read with Section 16 (1) of the Act. It is a clear principle of law that no spoliation is committed where a person is lawfully deprived of his possession. The respondent can justify his dispossession of the applicant by statute to dispossess the applicant. However, when these powers are exercised through a statute as they do in the case in *casu* these powers must be exercised strictly within the narrow limits laid down in the relevant statute. Statutory enactments which allow exceptional and radical changes in possessory relations without recourse to a court order are interpreted restrictively by the courts. (see *Globe Advertising Co. vs Town Council of Johannesburg 1902 T.H. 186*).

It is clear to me from the facts of this case that the remedy under *mandament van spolie* cannot maintain in the present case.

I wish to observe, however, that the police cannot detain peoples possessions *ad infinitum* the Act spells it out clearly what is to be done upon seizure of a motor vehicle. Section 16 (3) reads:

"A person arrested or a motor vehicle seized under the Act shall within a reasonable time not exceeding seventy-two hours be brought before a court by any officer of a rank of Sergeant or above for purpose of obtaining a warrant for further detention of that motor vehicle".

This was not done in this case. The applicant may in law sue for damages in a proper action.

For present purposes the application sought on the papers as they stand fails with costs.



S.B. MAPHALALA
JUDGE