

1087



SWAZILAND HIGH COURT

DE SOUSA Feaelis

Applicant

V

COMMISSIONER OF POLICE

1st Respondent

ATTORNEY GENERAL

2nd Respondent

MIKE MAMBA

3rd RESPONDENT

CIVIL CASE NO.1253/02

CORAM

FOR APPLICANT

FOR 1ST & 2ND APPLICANT

FOR 3RD RESPONDENT

SAPIRE CJ

MR. RODRIQUES

MR. MABILA

JUDGMENT

03/06/02

This is an application in which the applicant seeks delivery to him of a vehicle of which he claims as his own. The vehicle, at the time of the making of the application and as the position still is, that the vehicle in question, registration MMF78/11 is in the possession of the first respondent.

I will consider later how the vehicle got there but before coming to the merits of the matter I will deal with two points *in limine* raised on behalf of the third respondent. The points *in limine* are as follows:

1. There are no allegations in the founding affidavit to establish the jurisdiction of this court.

- i. Such a contention is untenable because first of all it is quite clear that this court has jurisdiction in matters such as this over all persons, resident or conducting business in Swaziland.
- ii. The Royal Swazi Police is part of the establishment of the country as is the Attorney General and the third respondent who seems to have an interest in the matter or who claims interest in the matter is also said to be resident in Fairview North in the Manzini District.
- iii. Although the word 'jurisdiction' does not appear in the founding affidavit, the allegations do establish that the court *prima facie* has Jurisdictions to hear this matter as the respondents are within the area of its jurisdiction.
- iv. The point is therefore without substance

2. The form of notice used by the applicant is defective

- i. Indeed in some respects it does not comply with the provisions of the rules of court.
- ii. My attention has been drawn to an earlier judgment; of this Court, in which Masuku J held that such a notice is irregular. This case the position is somewhat different.
- iii. It has been said time and again in the Appeal Court that the Rules of Court are not there to provide scope for the attorneys to score points against each other.

- iv. The purpose of a notice of motion is to ensure that
1. The Respondent is informed of the proceedings being brought against him,
 2. What the nature and particulars are of the claim being made,
 3. When such claim will be heard, and
 4. What is required of him if he wishes to oppose.

so that the respondent is not taken by surprise and given such information as is necessary to enable him to oppose the granting of the relief sought.

- v. It is open to anyone served with papers, which are not in the form prescribed by the rules, if prejudiced by such non-conformity to have the service and proceedings set aside
- vi. In the instant case, however defective, the notice of application or the notice of motion may be, the respondents have all received the notice, they have all reacted to thereto and filed affidavits placing before the court such facts, as they have considered relevant. Third Respondent who has raised the point is represented by an attorney who is in a position to present full argument. None of the respondents has taken the step of setting aside the irregular notice in terms of Rule 30. No prejudice to the respondents due to the form of the notice alone or occasioned by the defective notice has been suggested by any of the parties. First and Second Respondents do not in fact oppose the relief claimed. In so far as it may be necessary I condone any non-compliance of the rules and will proceed to deal with the merits.

The applicant seeks return to him of a motor car which is in the possession of the police. It is a vehicle that has been registered as it appears from the registration number to have been registered by Applicant in a neighbouring country. The applicant himself is apparently or may be, a *peregrinus* for he describes himself as

“an adult male, a Mozambican an Information Officer in the Ministry of Foreign Affairs in the Republic of Mozambique.” He claims ownership of the vehicle in question. The affidavits reveal that he acquired this vehicle by purchase from one Danny Kruger who in turn had shortly before acquired it from the third respondent by exchange. The vehicle in question was one of three given as *quid pro quo* for a BMW. The three vehicles that were given in exchange became by *traditio* the property of, initially Kruger, who on sale and delivery of one of them namely that now claimed by the applicant, to the applicant, transferred ownership therein to the applicant.. There is really nothing to contradict Applicant’s allegation that he is the owner.

Sometime after the exchange transaction had taken place, the police dispossessed the third respondent of the BMW. It seems to be alleged that the vehicle was a stolen one, though on the papers this has not been established.

It is the third respondent’s case, that the exchange transaction was fraudulent. This is not clearly established on the papers. It is clear that the Royal Swazi Police removed the BMW motor vehicle that he had acquired from his possession. There is nothing to show that the police were entitled to remove the vehicle or that it was in fact, to Kruger’s knowledge, a stolen vehicle. The matter is left entirely undecided. More important is that there is nothing to support 3rd respondent’s assertion that the applicant was not an innocent third party.

Sometime after the third respondent was dispossessed of the BMW he saw the applicant driving the vehicle in Swaziland. He succeeded apparently in stopping the applicant and either by force or otherwise in inducing the applicant to part with possession of the vehicle to the third respondent, who took it and placed it in the hands of the police.

The question of spoliation does not really arise in this case. This is, as appears from the notice of motion and the affidavits, which have been filed, a vindicatory claim. It is a claim for delivery of the vehicle that is owned by the applicant and which is presently in the possession of the police. The police represented by the respondents one and two are willing to hand over the vehicle and to abide the decision of the court.

The attitude of the first and second respondent which are the Commissioner of Police and the Attorney General is quite clear, they made no claim to this vehicle and

are prepared to deal with it as ordered by the court. The vehicle does not appear from the papers to have been seized by the police in connection with any pending case prosecuted against the Applicant. There is really no reason at all why the first and second respondents should not hand over the vehicle to the applicant.

The third respondent was given notice of the proceedings but the relief claimed in the notice of motion does not calling upon him to do anything.. All the relief claimed is, an order directing the first respondent to release forthwith to the applicant or his attorneys the motor vehicle, which is fully described.

For these reasons an order would be made in terms of prayer (1) of the notice of motion directing the first respondent to release the vehicle to the applicant including applicant's attorney forthwith.

In view of the attitude taken by the first and second respondent it would be unfair to make any order for costs against them and the costs of this application would have to be borne by the third respondent whose opposition to the order is unjustified.


S.W. SAPIRE
CHIEF JUSTICE