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THE HIGH COURT OF SWAZILAND

Civil Case No.1073/02

In the matter between:

BRIGHT ZONDO **Applicant**

AND

COMMISSIONER OF POLICE **Respondent**

CORAM **: MASUKU J.**

For Applicant **: Mr M. Mabila**
For Respondent **: Ms Z. Mkhwanazi**

JUDGEMENT
2nd August, 2002

This is an application in the long form and in which the following relief is prayed for:-

1. That the Respondent and/or his lawful subordinate(s) release the motor vehicle fully described in the affidavit annexed hereto to the Applicant forthwith;

2. Costs

3. Further and/or alternative relief.

The manner in which prayer 1 has been couched begs comment. Rule 6 (5) of the Rules of Court as amended provides the following:-

> *"If such application is brought upon notice to the Registrar, it shall set forth the form of order sought, specify the affidavit or affidavits filed in support thereof, request him to place the matter on the Roll for hearing and be as near as may be in accordance with Form 2 of the First Schedule."*

It is my view that where the above Sub-Rule refers to the form of order sought, it also requires the applicant to furnish full information regarding the Order sought. If delivery of property is required, the full particulars thereof must appear on the face of the Notice of Motion in order to establish the particulars or further information. To refer a reader to the affidavit for the particulars as is the case herein is totally out of order and must not be repeated. The Notice of Motion must be self-contained.

Facts of the matter

The Applicant alleges that on the 28th December 2001, a Police Officer, Mr Ngwenya, impounded his vehicle a green Golf bearing registration, number DVZ 181 GP. No particulars of the, model, chassis and engine number as is customary have been furnished by the Applicant. He contends that the Police never exhibited a Court Order before taking the said vehicle which is still in their possession. On enquiry, he was advised that the Police are awaiting results of tests regarding whether or not the motor vehicle is stolen. The Applicant further annexed a copy of an identity document of one Vusi Ephraem Nkosi whom he alleges is the seller of the vehicle. He was unable to furnish the registration documents to Court because they were seized by the Police together with the motor vehicle and remain in the custody of the Police.

The Respondent, on the other hand, contends that the vehicle was seized and detained on the 4th January 2002 in terms of the provisions of the Theft of MotorVehicles Act 16/1991 (hereinafter referred to as "the Act"). A detention Order by a Magistrate in the Hhohho District marked "DZ1", in proof of this assertion is annexed. The Respondent further contends:-

(i) that the numbers of the vehicle have been tampered with and the job number removed. An Affidavit of Dt.Sgt. Jotham Mashinini in support of this contention is annexed.

(ii) that the Applicant is not the owner of the vehicle in question

(iii) that the manufacturers of these vehicles, Volkswagen South Africa advise that according to their records, the information supplied in connection with this vehicle relates to a Fox 1.6 and not to a Citi Golf. In this connection, an Affidavit by Marius Delport of Volkswagen of South Africa is annexed and marked "DZ3".

(iv) that the Applicant has failed to furnish a document of disposal as required by the provisions of Section 7 of the Act.

In the Replying Affidavit, the Applicant applied, *in limine* for annexure "DZ3" to be struck out for the reason that it has not been authorised (should be authenticated) by a Notary Public and was signed and sworn to before a member of the South African Police Services yet they have an interest in the matter.

I propose to deal with the application to strike out first.

Application to strike out

The first basis for the application to strike out annexure "DZ1" was that notwithstanding that it was an affidavit sworn to and attested in the Republic of South Africa, it had not been authenticated contrary to the provisions of Section 13 of The Authentication of Documents Act 20/1965.

That Section reads as follows: -

(1) A document signed in the United Kingdom or, without prejudice to section 12,

in any other country or territory within the Commonwealth shall be sufficiently authenticated if authenticated by the certificate of –

(a) a notary public, if it bears his signature and seal of office, or
(b) the mayor or provost of a town, if it bears his signature and seal of office or
(c) the permanent head of a government department, or

(d) the registrar or assistant registrar of a court of justice having unlimited jurisdiction, or
(e) the high sheriff of such country, or
(f) an officer designated, in such country or territory, as an authority competent for the purposes of the Convention, to issue a certificate *(apostille):*

Provided that a document so signed which affects or relates to property not exceeding in amount or value one thousand emalangeni shall require no further authentication if it is authenticated by a certificate, similar to the form of certificate set out in the First Schedule, of a magistrate, assistant magistrate or a justice of the peace of the country, territory or place in which such document is signed.

(2) Subject to sections 10, and 12 subsection (1) shall apply to documents signed in the Republic of South Africa, or the Irish Republic, in the same way as it applies to documents signed in a country or territory within the Commonwealth.

It is clear from Section 2 that document in that Act includes an Affidavit. This therefor means that an Affidavit also needs to be authenticated.

Mr Mabila's argument however flies in the face of the provisions of Section 10 (1) of the said Act. The said Section provides the following: -

A document which is –

(a) .....

(b) an affidavit purporting to have been sworn before, and attested by a Commissioner of Oaths of –

(i) Swaziland outside Swaziland; or
(ii) Botswana, Lesotho, the Republic of South Africa or Namibia within

Such territories respectively;

Shall without further authentication, be accepted for use in a court in Swaziland unless it is proved not to have been signed or sworn by the person by whom it purports to have been signed or sworn.

From the reading of annexure "DZ3", it is clear that it was signed and sworn to by a Commissioner of Oaths in the Republic of South Africa. There is no evidence or even contention that it was not signed or sworn by the person who purported to have signed or sworn to it. It is therefor clear that this affidavit fully meets the rigours of Section 10 (1) (b) and that it can be used in this Court without further authentication. Had Mr Mabila devoted more time to the entire provisions of this Act, I am in no doubt that he would have abandoned this challenge. This point must therefor be dismissed.

Mr Mabila however had another string up his bow in his challenge of the propriety of accepting annexure "DZ3". He contended, as contained in the Replying Affidavit that the said affidavit was sworn before a Police Officer in the South African Police Services although they (S.A.P.S.) had an interest in the matter.

The Commissioner of Oaths to the said Affidavit was Johanna Annarette Nolte of the S.A.P.S. Vehicle Identification Section in Uitenhage. The nature of the interest that the Commissioner of Oaths had in the matter was not disclosed neither was any authority for that proposition provided by Mr Mabila.

An analysis of the relevant question was undertaken by Browde J.A. in **THE DIRECTOR OF PUBLIC PROSECUTIONS VS THE LAW SOCIETY OF SWAZILAND CIV. APPEAL NO.28/95**. This was however a decision on whether an attorney can serve as Commissioner of Oaths in any proceeding in which her or his clerk or partner has an interest. The conclusion was after considering two previous judgements of this Court, in **MAGAGULA VS TOWN COUNCIL OF MANZINI & OTHERS 1979-81 SLR 291** (per Nathan C.J.) and **F.N. DLAMINI VS J.N. DLAMINI 1982 – 86 SLR** (per Hannah C.J.) to the effect that it is not permissible and that such affidavits would be inadmissible.

At page 13 Browde J.A., in his careful analysis proceeded to state as follows in relation to the above rule: -

> "*...'it is a rule as old as Lord Hardwicke's time, that an affidavit, sworn before the solicitor of the party in the cause, cannot be used. The rule prevails in all the Courts of Westminster Hall.' It then goes on to say that the reason for this rule is "sufficiently obvious". I take this "obvious reason "to be the crucial requirement that a person attesting an affidavit must be completely objective and have no interest of any kind in the contents or import of that affidavit".* (my own emphasis)

Can it be said that Nolte had an interest in the "contents or import" of the affidavit *in casu*? As earlier indicated, no reasons have been advanced to show what the nature and extent of the interest is or is likely to be. It must be left to conjecture that the interest is only that she is a member of the S.A.P.S. The question that logically arises is whether she should by virtue of her membership of the S.A.P.S. *per se* be disqualified? Would the interest she has be of such proximity as to disentitle her to commission the affidavit?

It is well, in considering this issue to put the following facts in proper perspective. First the motor vehicle which is the subject of the investigations was impounded in Swaziland in terms of this country's legislation by a member of the R.S.P. Secondly, the assistance of S.A.P.S. at Oshoek Border, in particular Sgt. Mashinini was essayed to establish whether the vehicle was stolen or not, for purposes of reporting to the R.S.P. Mashinini made enquiries from Volkswagen South Africa and one Marius Delport of Volkswagen deposed to the affidavit in Uitenhage.

Can it be said, that the conspectus of these facts would lead to an inference that Nolte had an interest in contents or import of the affidavit? I think not. As indicated above, the proceedings were in Swaziland and all that she was required to do was to serve as Commissioner of Oaths in respect of an affidavit from Volkswagen S.A. There is no indication that she or her station or section was even remotely involved in any degree in either the investigations or the enquiries relating to the subject matter of these proceedings. This would mean that every Police Officer in South Africa would, regardless of where he or she is stationed not serve as Commissioner of Oaths and this would lead to illogical conclusions, particularly where it is clear that he/she or her station has no interest or role in the matter or the contents or import of the affidavit.

One may, for argument's sake consider a situation in which the Law Society President moves an application on motion for the removal of a practitioner from the roll in his capacity as such. It would in my view be untenable for one to conclude that none of the attorneys in Swaziland who are members of the Society can be qualified to serve as Commissioner of Oaths to an affidavit drawn in that connection. In my view, each case must be judged on its own merits after a careful scrutiny of all the attendant facts and circumstances. It is only after finding that there is an interest that a decision to disqualify be taken. I am of the view that this point *in limine* also ought to fail.

The Merits.

The question for determination is whether the Applicant has succeeded in making out a case for relief, particularly in terms of prayer 1 of the Notice of Motion.

Any person who applies for the release of a motor vehicle seized in terms of the Act will be successful if he can meet the requirements of the provisions of Section 16 (4) of the Act, which read as follows:-

> *"Any person who has evidence of ownership or lawful possession of a motor vehicle seized or detained under this Act may apply to court at any time within six months of the seizure with a view to securing the release of the motor vehicle."*

It is not disputed that the Applicant has launched this application timeously. With regard to the element of ownership or lawful possession, the Applicant in his affidavit states that the vehicle's registration documents were taken by the Police. He stated that he bought the vehicle from one Vusi Ephraem Nkosi of the Republic of South Africa and as earlier indicated, annexed a copy of the said Nkosi's identity document. This can hardly be said to constitute evidence of lawful possession or ownership of the vehicle.

The registration document handed by the Applicant to the Police was handed up to Court by Ms Mkhwanazi and it bears the name of one Mothlamme N.E., identity number 5611090713081 as the registered owner of the said vehicle. There is clearly a conflict in

the Applicant's story regarding the registered owner of the vehicle in question i.e. whether is Nkosi or Mothlamme. An attempt to find the said Nkosi with a view to obtain his affidavit apparently proved futile. It is however doubtful whether Nkosi's affidavit would have unlocked the mystery surrounding the ownership of this vehicle. However, his affidavit is not before Court.

It is also clear that the Applicant is not in possession of any document, as required by the Act in Section 7 (1) read with 7 (2) evidencing sale, transfer or disposal of the vehicle in question. Failure to furnish this document to the purchaser and failure to demand the same from the seller constitutes an offence. The Applicant has not been charged under this Section but it cannot be denied that the presence of this document would have gone a long way in buttressing his claim that he purchased the vehicle from whomsoever, provided of course the documents of title themselves confirm the identity of the alleged seller.

It is my view, regard had to the foregoing that the Applicant has failed to produce evidence of ownership or lawful possession of this vehicle as required by Section 16 (4). I am of the view that prayer 1 should therefor be dismissed.

Mr Mabila had an alternative argument to the effect that the detention Order in terms of which the said vehicle was detained lapsed in or about March 2002 and that the purported extension of the Order in May, 2002 was ineffectual. I do not agree. The initial detention Order was issued on the 7th January and was valid for a period of three months. If one regards this to refer to calendar days, it would mean that the detention Order lapsed on the 7th April 2002. The extension was done on the 10th May 2002, some two or three days after the lapse. This would not, in my view be regarded as an unconscionable delay such as to lead to a conclusion that the extension was ineffectual.

Should I be wrong in this conclusion, there is yet another insuperable difficulty facing the Applicant, in that if I were to hold that the detention Order lapsed would the vehicle then revert to him as a consequence? I think not because of his failure to produce evidence of his ownership or lawful possession of the vehicle. Furthermore, the affidavit of Sgt. Mashinini reflects that the job number was removed and the affidavit of Delport reflects that the information obtained from their records revealed the manufacture of a vehicle other than the type of the one in issue. This remains unchallenged.

The above facts would raise the presumption of theft contained in the provisions of Section 4 of the Act, which would render it difficult or improper for the Court to release the vehicle to the Applicant as the defects referred to above have not been explained.

Mr Mabila then referred the Court to **DATNIS MOTORS (MIDLANDS) (PTY) LTD VS MINISTER OF LAW & ORDER 1988 (1) SA 503 (NPD)** where Didcott J. ordered vehicles which were reasonably suspected to have been stolen to be returned to the Applicant, a motor vehicle dealer. The basis for that decision was that it had not been proved that the vehicles were in fact stolen and that there were a number of other likely explanations for the falsifications. The State had declined to prosecute in the absence of evidence as to where and from whom the vehicles had been stolen.

The problems and concerns raised by the learned Judge in respect of Section 31 (1) (b) of the Criminal Procedure Act 1977 of South Africa in terms of which the vehicles were held, in part led him to order the release of the vehicles as aforesaid were all adequately addressed in The Theft of Motor Vehicles Act. Of particular interest are the provisions of Section 16 (7) of the Act with the following rendering:-

> *"No Court shall order the release of a motor vehicle seized under this section to the person from whom it was seized only because the Director of Public Prosecutions has declined to prosecute that person or that person having been prosecuted has been acquitted of the offence in connection with that motor vehicle, unless the release is supported by documentary proof of ownership or lawful possession."*
> (my own emphasis).

I have already found that the Applicant has not furnished such documentary proof. It would appear, in view of the Legislative nomenclature that the declinature to prosecute and/or the failure to establish the identity of the complainant or where the vehicle was stolen does not assist an Applicant if he has no documentary proof of lawful possession or ownership. The other major concern of Didcott J. was the interpretation to be attached to the forfeiture clauses in the Criminal Procedure Act as aforesaid. Those concerns are of no moment in Swaziland as Section 22 deals comprehensively and fairly in my view with the elaborate processes that precede the forfeiture. In view of the foregoing, it is my view that

the **DATNIS CASE** is clearly distinguishable as there was before that Court no reference to or consideration of legislation which contains provisions similar to the Act.

The reference by Mr Mabila to the appellate judgement in **MINISTER VAN WET EN. ORDE VS DATNIS MOTORS (MIDLANDS) 1989 (1) SA 926 (AA)** (per Van Heerden J.A.) which is unfortunately in Afrikaans does not change the conclusions that I arrived at considering the provisions of the Theft of Motor Vehicles Act in this country. The portions written in English on the headnote do not alter my conclusions as reflected above.

The one last issue raised is that the Applicant is entitled to the release of the motor vehicle by virtue of the fact that he has satisfied the requirements of the *rei vindicatio.* The authors Oliver N.J.J. *et al,* "Law of Property", 2nd Edition, Juta & Co. Ltd, 1992, define the *rei vindicatio* in the following language at page 127:-

> *"The **rei vindicatio** is an action with which the owner can recover a thing that is still in existence and identifiable and that was removed from the owner's physical control unlawfully."*

The Applicant, as held above, has clearly failed in my view to show that he is the owner of the motor vehicle in question and has further failed to show that the vehicle was removed from his physical control unlawfully. The removal was in terms of the Act as contended by the Respondents. It cannot with benevolence be said that he has satisfied the requirements of the *rei vindicatio.* It is also my view that whatever the position may be at common law, the Act has materially altered the position at common law. The Courts cannot, in the face of legislative interventions continue to operate on the basis of the common law, thereby stultifying legislative intention and overriding Legislative solicitudes in the process. See **GIYANI DLAMINI VS COMMISSIONER OF POLICE & ANOTHER CASE NO.3050/98** (unreported, per. Maphalala J.) and **BHEKISA MDZINISO VS THE COMMISSIONER OF POLICE AND ANOTHER CASE NO.3132/00** (unreported, per Masuku J.) at page 8.

CONCLUSION.

In view of the foregoing, it is my view that the Applicant has failed to make out a case for the relief sought. The Application be and is hereby dismissed with costs.

T.S. MASUKU
JUDGE