

THE HIGH COURT OF SWAZILAND

MDUDUZI BRIAN QWABE

Applicant

And

THE COMMISSIONER OF POLICE

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

Civil Case No. 1251/2004

Coram

S.B. MAPHALALA – J

For the Applicant

MR. J. MAVUSO

For the Respondents

MISS H. NDZIMANDZE

JUDGMENT

(21/07/2004)

This is an application brought under a certificate of urgency and in which the following relief is prayed for:

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- a) "a) Dispensing with the rules of the above Honourable Court and hearing this matter as a matter of urgency;
- b) Directing the 1st Respondent to release to Applicant the under-mentioned motor vehicle:

1 x VW Golf Sedan 1990 model bearing registration number SD 157 XH engine number HY0835G0, chassis number AAV222172K4020430.

- c) Costs of suit in the event the application is opposed.
- d) Further and/or alternative relief.

The founding affidavit of the Applicant is filed in support thereto. Confirmatory affidavits of one Solomon Nhlengethwa and Nelisiwe Qwabe are also filed. Annexure "A" being a letter of agreement between the Applicant and one Michael Zulu is also filed.

The Respondents opposed the application and the answering affidavit of 3249 Detective Sergeant Jabulani Thwala is filed.

The Applicant avers that he bought the vehicle from one Michael Zulu sometime on or about September 2003, as evidenced by annexure "A" being the agreement of sale between him and the said Michael Zulu. He intended to register the vehicle under his wife's name and to that end he proceeded with his wife to the Royal Swaziland Police Headquarters, at Siteki where they were granted a Police Clearance Certificate (annexure "B"). For one reason or another the process of registering the vehicle into his wife's name was not finalized.

Sometime on or about the 21st April 2004, he gave Solomon Nhlengethwa his vehicle to drive. He had requested the vehicle because he was making funeral arrangements for a relative of his who had passed away. Whilst driving the vehicle, he was stopped by the Mbabane Police and was told to drive the vehicle to Mbabane Police Station as they suspected the vehicle was a stolen vehicle. The vehicle has since been detained by the police.

The defence put forth by the Respondents is that the Applicant's motor vehicle was seized and detained in terms of Section 4 (b) of the Theft of Motor Vehicle Act, 16 of 1991. Upon examination by Detective Inspector G.E. de Jager who is based at South

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African Police Service attached to the Vehicle Identification Section, it was found that the engine and chassis numbers on the vehicle have been tampered with and job tag was not found on the vehicle. In terms of Section 4 (b) of the Act a motor vehicle that has its engine and chassis numbers tampered with is presumed to be stolen until proved otherwise.

The argument advanced in support of the application is two-fold. Firstly, that the results as contained in annexure "BD2" fall far too short of proving that the vehicle has been tampered with, in terms of the Motor Vehicle Act in that the qualifications and experience of Detective de Jager has not been set out in the papers and as such, he cannot be treated as an expert witness. Secondly, in the result, Detective de Jager fails to set out the original identification status of the vehicle. He only makes allegations without supporting them with reasons.

It was argued for the Commissioner of Police firstly, that the motor vehicle was seized on reasonable suspicion that it was stolen thus making it necessary to conduct investigations in terms of Section 16 of the Act. Secondly, that the Applicant has failed to prove his ownership of the said motor vehicle in terms of Section 4 read with Section 16 (4) of the Act. Where a person is presumed to have committed an offence in terms of Section 3, the onus is on him to rebut that presumption by proving ownership or lawful possession of the motor vehicle. In this regard the Respondents concede that the letter of agreement purports to be a document of ownership, but they argue that in light of the apparent tampering on the motor vehicle that document or alleged ownership becomes doubtful. For this proposition the court was referred to the cases of Zwakele Nkumane vs The Commissioner of Police and another - Case No, 899/2003 and that of Bright Zondo vs The Commissioner of Police and another - Court of Appeal No. 36/2002.

On the results of tests carried out on the motor vehicle, it is the contention by Respondents that the South African Police Vehicle Experts proved that the motor vehicle does not presently bear its original and true identification marks as a result of the alterations done on the vehicle its true identity could not be established.

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On the issue of the opinion of expert witnesses it was argued for Respondents that it is not necessary to call an expert witness for making findings on a motor vehicle that it has been tampered with. The court was referred to L.H. Hoffmann and D. T. Zeffert, The South African Law of Evidence (4th ed) at page 97 on the weight to be attached to the documentary evidence of Detective de Jager.

Before court are three issues for determination viz i) proof of ownership of the vehicle, ii) the effect of the evidence of Detective Inspector de Jager and iii) whether there were "reasonable grounds to suspect" that the vehicle was stolen.

I shall proceed to address these questions ad seriatum, thus: i) Proof of ownership of the motor vehicle.

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 reads 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".

In the present case it is not in dispute that the Applicant has launched this application timeously. With regard to the element of ownership or lawful possession, the Applicant relies on annexure "A" being

an agreement of sale between himself and one Michael Zulu. The Respondents accept that the letter of agreement purports to be a document of ownership, but in light of the apparent tampering on the motor vehicle that document or alleged ownership becomes doubtful. It would appear to me this position is correct that the tampering on the motor vehicle cast a shadow on the nature of the ownership and calls for investigations to be carried out to establish the true origins of the motor vehicle. For this view I have sought refuge in the cases of Zwakele Nkumane vs The Commissioner of Police and another (supra) and the Court of Appeal vs The Commissioner of Police and another (supra).

5 ii) The effect of the evidence of Detective Inspector de Jager.

The evidence of officer de Jager is found in annexure BD2 being a police report compiled by the said officer after he had examined the said motor vehicle on the 17th May 2004. The officer stated under item 1.5 on the engine number that "the original number has been grinded off and current engine number HV083500 restamped on the block". Under item 1.6 on stamped chassis number, he wrote: "The panel on which the original vin number has been stamped on has been cut out and rejoined (sic) said panel belongs to an old model Volkswagen Golf. The chassis number on the said panel has been altered by means of welding. The original colour of the panel is yellow". The officer made other observations of tampering in item 1.7, 1.8 and 1.9 of the report. The officer concluded that the vehicle is suspected stolen.

The Applicant has urged the court not to attach much weight on this evidence in that it has not been shown ex facie the report what qualifications and level of experience the officer possesses.

It would appear to me that in casu there is direct evidence of observation by the officer who concluded that the vehicle is suspected to be stolen. His rank as it appears on the report is that he is an Inspector attached to a specialized unit in South Africa which deals with stolen motor vehicles. In this regard I find that what is said by the writers Hoffmann et, A1 The South African Law of Evidence (supra) at page 97 apposite. They stated the following:

"The opinion of expert witnesses is admissible whenever, by reason of their special knowledge and skill, they are better qualified to draw inferences than the judicial officers. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful".

I further agree with the submission made by Miss Ndzimandze for the Respondents that in fact it is not necessary to call an expert witness to making findings on a motor vehicle that has been tampered with. The issue of the motor vehicle being tampered with is a fact, in the present case.

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In conclusion therefore under this Head I find that the evidence of Inspector de Jager has proved conclusively that the motor vehicle was tampered with to attract the operation of the Theft of Motor Vehicle Act,

On the third issue viz iii) whether there were "reasonable grounds to suspect" that the vehicle was stolen on the facts of the case I find that there were. The Hhohho magistrate Court would not have issued a detention order on the 11th May 2004, if the evidence before the Magistrate fell short of satisfying the requirements of Section 16 of the Act.

In the result, I find that the Applicant has failed to prove his case for the relief sought. Costs to follow the event.

S.B.MAPHALALA

JUDGE