THE HIGH COURT OF SWAZILAND

CASE NO.2173/01

In the matter between:

JABULANI ZULU Applicant

And

THE COMMISSIONER OF POLICE Respondent

CORAM : MASUKU J.

For the Applicant : Ms Hlatshwako

For the Respondent : Ms D. Mamba

JUDGEMENT 10th FEBRUARY, 2004

This is an application in the long form for an Order releasing a motor vehicle presently in the hands of the Respondent, to the Applicant. The motor vehicle is described as a Toyota Corolla bearing engine number A4L095553 and registration number KXR 613 G.P. The Applicant also prays for the costs of the application.

In his Founding Affidavit, the Applicant states that he is the owner of the vehicle and that the said vehicle was confiscated by the Mbabane Police on the 23rd March 2001 on the suspicion that it was stolen. At the time of the seizure, the Applicant had no document pertaining to the registration of the vehicle. It was on the 6th August 2001, that he took the original certificate of registration of the vehicle, a copy of which was annexed to the Application and marked "J.Z. 1". I will revert to its contents later.

It is the Applicant's further contention that there is no justification whatsoever for the Police to continue detaining the vehicle since it is not stolen, an allegation that the Police have vigorously challenged.

According to 2944 Detective Sergeant Sipho Justice Mabuza, of the Drug and Car Theft Unit, and the investigating officer in this matter, after the seizure of the vehicle on the 23rd March, 2001, the Applicant made a statement in which he stated that he had purchased the vehicle from a Mr Denn of the Republic of South Africa and that the seller Mr Denn gave him a "duplicate blue book", promising to hand over the original once the pretium had been paid in full. A copy of the statement was annexed to the Answering Affidavit and the Applicant never denied making it or the truthfulness of its contents. It can reasonably be inferred in the circumstances, that the statement was made by the Applicant freely and voluntarily.

The Police also filed an affidavit of 04937244 Detective Sergeant Mashinini of the South African Police Motor Vehicle Unit, stationed at Oshoek Border Post. He testified that he examined the vehicle in question on the 29th February 2001 according to annexure "AG 2". This date cannot be correct regard had to the date of seizure. It is conceivable that Sergeant Mashinini erred in relation to the date. This does not however militate against the fact of the examination of the vehicle and the results of the said examination.

Sergeant Mashinini testifies further that his examination revealed that the original identity of the motor vehicle had not been tampered with and/or altered. He also discovered that the said vehicle had been reported stolen from one Sakkie van Niekerk on the 6th October 2000 at Hillbrow under Case No. 372/10/00, a matter still pending.

The law applicable

The law governing the seizure and release of motor vehicles is the Theft of Motor Vehicle Act 16 of 1991. Section 16 (4) thereof provides the following: -

"Any person who has evidence of the 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 that motor vehicle. "

This application was brought within the statutory period prescribed above. The question to be decided is whether the Applicant has provided the Court with the evidence of ownership.

I do not mention lawful possession because in his founding affidavit, the Applicant alleges that he is the owner.

In his statement referred to earlier marked "AG 1", the Applicant stated that a Mr Dernn sold the vehicle to him and that he had a duplicate book from Mr Dernn. The registration document relating to Mr Denn, whether original or duplicate, has not been filed with this Court to lend any credence to the Applicant's story. Instead, the Applicant filed a registration certificate pertaining to the vehicle in question marked "JZ 1" and it is in the name of Rammuki J.R. and not the Mr Denn referred to earlier.

There is in my view no evidence plausible before Court that the Applicant is the owner of the vehicle in question as the documents filed serve to bring more confusion than to clarify the Applicant's case. The vehicle is not registered in the Applicant's name nor in Mr Dernn's name. Mr Rammuki's association with the vehicle has not be explained by the Applicant, although he is not the registered owner according to the documents filed of record by the Respondent.

There are further insuperable difficulties in the Applicant's way. Section 16 (7) of the Act provides as follows: -

'Wo 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 ". (emphasis my own)

Again it is clear that the Applicant's case that he is the owner is not supported by any documentary or other evidence, nor can it be said that although he does not allege to be in lawful possession of the vehicle, that the documentary evidence on record supports that conclusion. The documents filed of record prove neither.

One should also not lose sight of the results of the examination conducted on vehicle by the Police. According to the Police, the vehicle was reported stolen in Hillbrow. The name of

the registered owner is given and so is the Case Number. This in my view brings this case at least within the realms of the presumption of theft provided for in Section 4(1) (a) of the Act. One cannot, on the evidence, discount the contravention of Section 4 (1) (c) and (d) by the Applicant as well. I may well add that the document of the purchase of the motor vehicle required by the provisions of Section 7(1) has not been filed as it would go some way in supporting the Applicant's story that he acquired this vehicle in a regular fashion.

This case in my view is on all fours with BRIGHT ZONDO VS THE COMMISSIONER OF POLICE AND ANOTHER APPEAL CASE NO.36/02 (Per Steyn J.A.), in which a judgement from this Court was

upheld by the Court of Appeal. The facts are substantially similar.

There is one point that was raised by Ms Hlatshwako that I need to advert to. She argued that the Police no longer have a valid detention Order and for that reason, the vehicle must be released to the Applicant. Whilst it may be correct that at this stage there is no valid detention Order, the vehicle can only be released to the Applicant if he furnished the documentary evidence of ownership or lawful possession. The absence of a detention Order does not dispense with the requirements of Section 16 (4) and 16 (7).

Sight should also not be lost of the fact that the Police cannot continuously renew detention Orders ad infinitum, particularly as here, where the results raised the presumption of theft. Furthermore, the provision relating to the disposal of vehicles as provided in Section 22 have to come into operation. Admittedly, there may be no vigilance in enforcing the forfeiture provisions by the Police at present. This point, in my view, ought to fail.

There is yet another alternative argument raised by Ms Hlatshwayo. She contended that the Court should, from the papers filed, at least find that the Applicant is a bona-fide possessor of the vehicle and therefor order that the vehicle be released to him. I had occasion to deal with this very question in the case of BHEKISISA MDZINISO VS THE COMMISSIONER OF POLICE AND ANOTHER CIV. CASE NO. 3132/00 (unreported). At page 8 of that judgement, I held as follows.

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"The other issue that I must mention which Mr Dlamini did not pursue was the allegation that the Applicant is a bona fide purchaser of the vehicle and as such, his title to the vehicle is unimpeachable. This is so at common law. My view however is that the provisions of the Act have altered the common law and in cases where the vehicle is suspected to have been stolen on reasonable grounds, it is no defence to say that you are the bona fide purchaser of the same. To do so would stultify the intention of the Legislature as it would allow persons to remain in possession of vehicles otherwise proved to have been stolen. The whole purpose of the Act would thus be defeated. "

I reiterate the above views as applicable in this matter, I would add that the circumstances in this matter are exacerbated by the fact that the allegation of bona fide possession are bald. There is no documentary or other evidence from which the conclusion that the Applicant is a bona fide possessor can be drawn. As indicated earlier, there is no document, as required by Section 7 (1); the receipts in proof of payments made to Mr Denny are wanting and there is not even an affidavit from Mr Denny confirming the Applicant's story. It would be highly precipitous for the Court to rely on such hollow and unsubstantiated allegations. For the avoidance of doubt, even if these were filed, they would not assist the Applicant in view of the effect of the Act on the common law as adverted to above.

I am of the view that this legal point ought to be dismissed. I further note that the allegation that the Applicant is a bona fide possessor was not averred neither in the Founding nor in the Replying Affidavit,

In view of the foregoing, I can come to no other conclusion than that the Applicant has failed to meet the requirements of the Act. There are no documents supporting the claim that he is the owner of the vehicle nor the un alleged alternative that he is the lawful possessor. This application be and is hereby dismissed with costs.

On a cautionary note, applicants for the release of for motor vehicles must fully canvass all the relevant allegations of ownership or lawful possession, as the case may be, and must file ail the supporting documents. It is fallacious to supply sketchy information in the founding affidavit, resting on the forlorn hope that the Police will not oppose the application. The

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founding affidavit must be conscientiously drawn with the worst case scenario in mind, failing which the Applicant may be forced to make out a case in the Replying Affidavit, a course that is not

permitted at law.

T.S.MASUKU

JUDGE