

HIGH COURT OF SWAZILAND

CIVIL CASE NO.2869/02

In the matter between:

COOLMAN MATHATHE

APPLICANT

VS

COMMISSIONER OF POLICE &

ANOTHER DEFENDANT

CORAM

SHABANGU AJ

FOR APPLICANT

MR. B. MAGAGULA

FOR DEFENDANT

MS. MAMBA

JUDGMENT

The applicant one Coolman Mathathe commenced application proceedings before this Court by notice of motion dated 27th August, 2002 but filed with the Registrar and served on the respondents on 23rd September, 2002 almost a month later.

Applicant seeks an Order:

- (a) Directing and ordering the first respondent to release to the possession of the applicant and/or his attorneys the motor vehicle registered FLD 769 GP belonging to the applicant.

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- (b) Directing the first respondent and second respondent to pay costs of the application.

In support of the application the applicant alleges that he is the registered owner of the motor vehicle which is described above. The applicant further states that he purchased the vehicle at an auction sale at Johannesburg Police Station on 13th Street, Soweto, in the Republic of South Africa in February, 2001. The applicant then states the vehicle is registered in his name and attaches a certificate of registration which is marked "A". The motor vehicle according to the application was seized by the "First respondent in April, 2002 whilst it was being driven by one Vuyisile Matsenja. The applicant says that even though he sold the motor vehicle to one Vusi Matolo of Johannesburg at a purchase price of E25,000.00, change of ownership has not been effected thus far," because the said Vusi Matolo who has paid him a deposit of E15,000.00 still owes to the applicant an amount of E10,000.00.

It seems clear therefore that the applicant who according to his own papers no longer had possession of the vehicle after the alleged sale to the said Vusi Matolo claims on 'the asserted basis that he is the owner. The applicant's case on the ownership of the vehicle could have been presented more fully by an attachment of some documentary evidence of the purchase of the vehicle from the Johannesburg Police Station. Furthermore, even an affidavit from officials of the South African Police would have rendered the applicant's assertion of ownership of the vehicle more clearer. After all, if the applicant really purchased the vehicle from the South African Police, the said South African Police have a duty as the seller to protect the applicant in his vacua possessio in accordance with the implied warranty against eviction in contracts of sale. The least that the South African Police could have done in discharge of the aforementioned duty would have been to file an affidavit in support of the applicant's claim confirming the existence of the sale. If they fail

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to assist the seller in accordance with the seller's warranty then the applicant who is also a South African resident of Rockville, Soweto could have appropriate remedies against the South African

Police " arising from the breach of the said warranty. The applicant does not state why such evidence from the South African Police, from whom the applicant claims to have purchased the vehicle is lacking.

The applicant's claim based as it is on the assertion of ownership made in the founding affidavit may support a cause of action either on the rei vindicatio or section 16(4) of the THEFT OF MOTOR VEHICLE ACT 16/1991.

The respondents in their opposition to the applicant have filed an affidavit by one Constable Sikhumbuzo Fakudze who says that he was

"... assigned to be the investigating officer of the possible theft or otherwise of a motor vehicle registered FLD 769 GP..."

This deponent to the respondents' opposing affidavit denies that the applicant is the "registered owner" of the vehicle as alleged in paragraph 4 of the founding affidavit. He then goes on to say –

"that upon investigation by members of the Royal Swaziland Police together with the Car Theft Personnel at Oshoek Border Post the examination results showed that the motor vehicle was stolen on the 19th August, 2001 from M.R Basson of 37 Panora Street, Ennerdale who is the registered owner of the motor vehicle, I beg leave to refer the Honourable Court to "A.G.I" being a copy of the examination results of the motor vehicle.... The engine and the chassis numbers reflected in the results are different from those in the applicant's registration documents."

The attached annexure "AG1" to the answering affidavit reflects that the true engine number according to the police, is 3B59985 and the chassis number AFAWLDL01WR238673. The document which is annexure "AG1" of the answering affidavit confirms what the deponent to answering affidavit already has stated. It was suggested by Mr. Nzima during argument that the above quoted passage by the deponent to the respondents' answering was nothing more than hearsay. It seems to me that there is no merit in the suggestion made by Mr. Nzima in that the deponent describes himself as a person who was assigned to be the investigating officer in respect of the motor vehicle. The deponent, who goes on to say that investigations were

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carried out by both the South African Police and the Royal Swaziland Police may reasonable and fairly be understood to be saying that as the person assigned to be the investigating officer he worked together with the South African Police. On this basis the respondents contend that the vehicle was seized and detained in accordance with Section 16 of the THEFT OF MOTOR VEHICLE ACT, 16/1991.

Whether the applicant's claim is based on the rei vindicatio OR section 16(4) of the THEFT OF MOTOR VEHICLE ACT, 1991 the respondents' retention of the vehicle would be justified if it is shown to be in accordance with Section 16 of the THEFT OF MOTOR VEHICLE ACT, 1991.

Furthermore, the applicant in terms of Section 16(4) would have to establish by evidence his ownership or right to possess the vehicle. Similarly in a claim based on the rei vindicatio the applicant have to satisfy the court by evidence of its ownership of the vehicle. A mere ipse dixit or bare assertion by the applicant will not suffice. Ownership is not necessarily proven by the documents of registration of the vehicle. Evidence of the sale transaction and the delivery pursuant thereto (including the manner of delivery) would be such evidence as may tend to prove ownership. In this particular case not only are the allegations made by the applicant in relation to the asserted ownership insufficient they are disputed by the respondents who tender evidence, which may be evidence of their reasonable grounds of suspicion that the vehicle is a stolen one.

In terms of Section 16(4) upon which Mr. Nzima relied for the application the applicant is required to be a –

"... person who has evidence of the ownership or lawful possession of the vehicle."

Similarly if the applicant relied on the rei vindicatio he will have to be a person who has evidence of the ownership of the vehicle, which evidence will have to be included in the application.

At the commencement of argument I sought clarification from applicant's attorney on whether he intended to proceed with the application on the papers inspite of what may appear to be a dispute of fact. It appears that Mr. Nzima considered that any dispute on the ownership (assuming there

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was such dispute) was not material and that the application could still be granted on the papers. The applicant's attorney argued in this regard that the detention of the motor vehicle by the respondents was no longer justified because respondents did not obtain a warrant for its further detention from a competent court within the prescribed seventy-two hours (see Section 16(3) of the THEFT OF MOTOR VEHICLE ACT, 1991.) Further that in any event the detention order which was obtained outside the prescribed time limit allowed the respondents to detain the vehicle for only a period of three months which has since lapsed. In light of this the respondents' representative produced in court a further warrant for the detention of the motor vehicle granted by the Manzini Magistrate's court the dated 27th June, 2003 authorising that the detention be extended for further three months. The explanation by respondents counsel on the reason for not including the said warrant in the papers filed in court, namely the respondents' answering affidavit was the fact that the respondents did not have in the possession the warrant which was then being produced and that previous warrants they had obtained in respect of the vehicle had expired.

In as much as the applicant in an application of this nature would be required to state evidence of his ownership or his lawful possession the respondents are required to show that their possession of the vehicle is justified in the sense that it is within the four comers of the THEFT OF MOTOR VEHICLE ACT, 1991. In this regard is noteworthy that the respondents' affidavit does not appear to show that the holding of the motor vehicle by the respondents satisfies the requirements of the Act,

For a motor vehicle to be seized under Section 16(1) of the THEFT MOTOR VEHICLE ACT, 1991, it must have been seized by a police officer:-

1. Who has reasonable grounds to suspect that the vehicle has been stolen.
2. That the person from whom the vehicle is seized is the person who either himself stole the vehicle or has received the motor vehicle knowing it to be stolen or that the said person has assisted in the stealing of the vehicle.

The relevant provision is quoted verbatim herein as follows:-

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"Any police officer may without warrant search and arrest any person found in possession, of a motor vehicle if he has reasonable grounds to suspect that the 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."

It would appear therefore that the THEFT OF MOTOR VEHICLE ACT, 1991 does not authorise the seizure of a stolen motor vehicle from anyone other than from a person who himself is suspected to have stolen the vehicle or has received the vehicle knowing it to be stolen or has assisted in the stealing of that motor vehicle. Support for this proposition is found in the unreported judgment in SIBUSISO GULE VS. COMMISSIONER OF POLICE AND ATTORNEY GENERAL HIGH COURT CASE NO. 182/02 delivered on 19th March, 2002. In that case as in the present case there was no evidence on behalf of respondents to show that the vehicle was stolen by the person from whom it was seized or that she/he had received it knowing it to be stolen, or that he assisted in its stealing. Further in this case other than the document produced from the bar stated by respondents' representatives to be a warrant there is no evidence in the body of the answering affidavit filed on behalf of respondents to the effect that a warrant was obtained for the further detention of the vehicle. On this aspect though, it may be worth mentioning that once the vehicle is detained in terms of an order of a competent court whether this Court is a Magistrate or the High Court the warrant is effective until set aside for any reason. It is possible that the High Court may in the exercise of its inherent

jurisdiction to review proceedings of Magistrate's court, find that such warrant is to be set aside once appropriate review proceedings are brought. The first evidence of the existence of a warrant for the detention of the vehicle is contained in the applicant's replying affidavit. It may well be however that an application for review to this Court would be unnecessary because it seems to me that there is nothing to prevent the person from whom the vehicle is seized or any applicant who claims ownership or lawful possession from approaching the same court which granted the

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warrant for its detention for the release of the motor vehicle with the evidence of ownership or lawful possession.

In light of the foregoing the respondents have not shown that the vehicle is held by them lawfully in terms of Section 16 of the THEFT OF MOTOR VEHICLE ACT, 1991 because of the lack of evidence that the initial seizure was in accordance with Section 16(1) of the MOTOR VEHICLE ACT, 1991. The matter does not end there however. In the Sibusiso Gule case referred to above and according to the judgment the applicant was the person from whom the vehicle was seized but there was no evidence linking him with the theft of the motor vehicle. The fact that the respondents, have not shown that their holding of the vehicle is justified by Section 16 of the Act, means only that the provisions of the Act do not protect the police. Does it follow that this Court should order the release of any vehicle which is in the possession of the police to anyone who so applies even though that person has not shown any entitlement to such motor vehicle? I do not think so. That would not only violate one's common sense, but it would also violate the principles governing litigation in our practice, \* namely, that an applicant who 'approaches a court seeking certain forms of relief must satisfy the court by not only establishing a cause of action in his papers, but must also be essential evidence in support of the relief claimed. In other words the applicant must show his entitlement to the relief claimed. If the founding affidavit is inadequate the applicant would not be entitled to the relief claimed. Herbstein and Van Winsen states the position as follows:

"The supporting affidavits must set out a cause of action. If they do not, the respondent is entitled to ask the court to dismiss the application on the ground that it discloses no basis on which the relief claimed may be granted. In application proceedings the affidavits constitute not only the evidence but also the pleadings and, therefore, whilst it is not necessary that the affidavits should set out a formal declaration or [an answering] affidavit set out a formal plea, these documents should contain, in the evidence they set out, all that would have been necessary in a trial"See Herbstein and Van Winsen's THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA 4<sup>TM</sup> ED. page 364.

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The learned authors proceed to quote the dictum of Miller J. in HART V PINETOWN DRIVE INN CINEMA (PTY) LTD 1972(17 SA464

D at 469 C-E as follows:

"Where proceedings are brought by way of application., the petition, is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration, but also of the essential evidence which would be let at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound."

From the above it is clear therefore that for an applicant to be entitled to the relief claimed in his notice of motion, his affidavit which should include material which would form part of both the pleading and the evidence, must contain sufficient evidential material as would be necessary for determination of the matter in his favour. As already stated such material would not be provided by a bare assertion that the applicant is owner. Evidence of ownership will ordinarily, but not necessarily, take the form of material indicating how the ownership was acquired, such as written evidence of the sale and delivery of the vehicle under circumstances indicating that ownership was indeed transferred from the transferor who could also be the seller to the , applicant. That is by way of an illustration though because there are

a number of methods by which ownership may be proven. The applicant does not even state that he is the owner of the vehicle which was not seized from his possession, but he states that he is the "lawful registered owner" of the vehicle, which is not quite the same thing as owner of the vehicle. Case law authorities abound for the proposition that, motor vehicle registration papers are not documents indicating title to ownership. As already observed earlier on, the applicant could have annexed to his founding affidavit not only documents recording the sale transaction between him and the South African Police, but could easily have obtained a supporting affidavit from the said South African Police, who had a duty in terms of the law of sale to defend the applicant's vacuo possessio.

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In the circumstances I am unable to come to the conclusion that the applicant has placed before this Court sufficient material to enable the court to find in the applicant's favour on the question of ownership. In the circumstances, the application is dismissed with costs.

A.S. SHABANGU

Acting Judge