



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 105/12

In the matter between

THEMBA ROBERT DUBE

Appellant

VS

**THE COMMISSIONER OF POLICE
THE ATTORNEY GENERAL**

**1st Respondent
2nd Respondent**

Neutral citation: *Themba Robert Dube v The Commissioner of Police & Another* (105/12) [2014] SZHC 130 (24 June 2014)

Coram: **Mamba J**

Heard: **24 June 2014**

Delivered: **24 June 2014**

[1] Civil Law – motor vehicle impounded and detained by Police in terms of section 16 of the Theft of Motor Vehicle Act 16 of 1991, on the ground that it is suspected to have been stolen – Expert examination establishing that chassis and engine numbers of motor vehicle tampered with such that the true identity of the motor vehicle could not be ascertained.

- [2] Civil law & Procedure – person from whom motor vehicle seized and detained under section 16 of Theft of Motor Vehicle Act 16 of 1991 failing to prove that he is the owner of vehicle or that his possession thereof is lawful – Appeal dismissed.
- [3] Civil Procedure – Court granting forfeiture of vehicle to the state where no such application made. Such order irregular and quashed or set aside.
- [1] On 30 May 2011, the appellant who was the applicant in the Court below, filed an application seeking inter alia, for the release to him of certain motor vehicle with the following description or particulars namely:

Make	Toyota
Registration	SD 829 TM
Model	1990
Engine Number	2Y9034239 and
Chassis Number	YN 560011729

He alleged that this motor vehicle was his and had been impounded by the Police whilst it was being driven by his employee. The motor vehicle was impounded by the Police on 30 March, 2011 and was on 30 May 2011 formally detained by the said Police through a court order granted by a Magistrate. This was after an application had been made by the Police in terms of section 16 of the Theft of Motor Vehicle Act 16 of 1991.

- [2] The Police impounded and detained the said motor vehicle on the ground that it was suspected to have been stolen or that its Engine and Chassis Numbers had been tampered with.
- [3] On investigation by one Benedict Nyembezi Masina, an expert in the identification of motor vehicles, it was discovered that indeed the said numbers had been tampered with to the extent that 'the true identity of the motor vehicle could not be established.' The investigation established further that contrary to what the appellant said, the motor vehicle was a 1994 model and the Engine Number thereon was IY9000318.
- [4] In reply, the appellant then revealed that the Engine in the motor vehicle was indeed not that stated by him in his notice of application and in the motor vehicle's blue book or card. He stated that he had removed the original and registered Engine from the motor vehicle and installed another one from one of his motor vehicles. He said he did so after the relevant Engine had developed some mechanical faults. He conceded further that he had not followed the proper channels in doing so and had thus not reported the said change of Engines to the Motor Registry Department.

[5] Based on the above findings, in the main by Mr Masina, the court a quo dismissed the application and ordered that the motor vehicle in question be forfeited to the state. I hasten to add that there was no prayer by any party for the forfeiture of the motor vehicle. The Court made that order *mero motu* and there is no indication on the court record that the parties herein were given the opportunity to be heard on that issue.

[6] The appellant, not satisfied with the decision of the Court dismissing his application, has appealed to this Court. In his Notice of Appeal, the appellant has stated and argued two grounds only namely that:

- ‘1. The Court a quo erred in law and in fact in finding that the motor vehicle was tampered with when the Engine and Chassis Numbers were still original.
2. The Court a quo erred in law and in fact in ordering the forfeiture of the motor vehicle registered SD 829 TM yet it was not proven that there was a criminal intent in the fitting of a new Engine into the body of another motor vehicle both belonging to the appellant.’

[7] The Court below, as hereinbefore stated, dismissed the application mainly based on the expert evidence that the Engine and Chassis Numbers of the motor vehicle had been tempered with to the extent that the true identity of the motor vehicle could not be identified or ascertained. By implication, it came to the conclusion, that was almost inevitable or inescapable in the circumstances, that the appellant was unable to demonstrate that he was the owner or lawful possessor of the relevant motor vehicle.

[8] Section 16(7) of the Theft of Motor Vehicle Act 16 of 1991 provides that:

‘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.’

From these provisions, it is plain that the appellant from whom the motor vehicle was seized or impounded had to satisfy the court; by documentary evidence, that he was either the owner thereof or that his possession of the motor vehicle was lawful. Again, it is clear from the available evidence that the appellant was unable to provide or produce this evidence. His

difficulties were compounded by the fact that the true or real identity of the motor vehicle or Engine could not be ascertained as a result of the tempering with the relevant numbers thereof. The issue of whether the appellant had a criminal intent in doing what he did on the motor vehicle was largely a peripheral matter.

[9] From the foregoing, the appellant has failed to persuade this Court that the decision by the Court a quo was wrong. That being the case, the appeal fails and is hereby dismissed with costs. That, however, cannot be said of the forfeiture order.

[10] The respondent did not apply for the forfeiture order. There was no application at all for this drastic order and the issue was not canvassed at all in the papers before the Court a quo. The matter only appears in the inspection report by Mr. Masina where he states that

‘...the Royal Swaziland Police can dispose off this vehicle according to applicable laws.’

This is, however, not an application to the court for an order that the vehicle be forfeited to the state. A proper application, has, to my mind, to be made for such an order wherein the appellant may be afforded the chance to be

heard thereon. He may for instance have the necessary evidence to save or redeem the vehicle or at least the Engine he fitted onto it. Therefore, I am of the judgment that the forfeiture order issued by the Court below cannot stand. It is hereby set aside.

MAMBA J

For Appellant : Mr Khumalo

For Respondent : Ms P. Simelane