



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2799/2010

In the matter between

CARLOS DA CUNHA

1st Applicant

And

THE COMMISSIONER OF POLICE

1st Defendant

**THE ATTORNEY GENERAL OF THE
KINGDOM OF SWAZILAND**

2nd Defendant

Neutral Citation: *Carlos Da Cunha v The Commissioner of Police & Another
(2799/2010) [2014] SZSC 390 (31st October 2014)*

Coram: **Dlamini J**

Heard: **26th September 2014**

Delivered: **31st October 2014**

Application for release of a motor vehicle whose component has been found to be stolen – applicant contending that police should keep the part indicating stolen and release the rest – such orders, if granted would defeat the Theft of Motor vehicle Act and criminal justice system – police entitled to keep whole motor vehicle.

Summary: By motion proceedings the applicant seeks for an order for the release of a *merx* seized and detained by 1st respondent. 1st respondent opposes the application on the basis that it is a subject of a criminal investigation.

Parties contentions

[1] Applicant avers in his founding affidavit:

11. *It therefore became necessary that I find a new sub-assembly (the part of the engine that houses the pistons and con-rods) in order to re-build the engine and get the vehicle running again.*

15. *In about 2005 whilst at Mormond I noticed an engine sub-assembly lying in their yard and offered to purchase it. That was the same engine that Mormond Electrical had purchased from Sarel's Workshop. I annex hereto marked "CD4" a copy of a letter confirming that the vehicle had been purchased. The idea was then to use it on the vehicle which I had purchased.*

16. *I then inserted the newly purchased engine sub-assembly into the vehicle and took the vehicle for inspection clearance with the Swaziland Police.*

17. *Upon inspection, it was discovered that the engine which was sold by Sarel's Workshop to Mormond Electrical had in fact been stolen and had been reported years ago in the Republic of South Africa.*

18. *I then contacted John Thompson who then contacted Sarel's Workshop and obtained an affidavit which the original owner of the engine Mr. Gerald Tilburg had presented to the South African Police in Loskop. I annex hereto marked "CD4".*

19. *The affidavit reads inter alia "during the years 1995 – 2002 I operated a small mini moved business. I was to remove all the rubbish left at the premises of the then Wood Side Motors Escourt. Businesses does not exist today. All the rubbish was removed and dumped. I kept a block and sump from a motor found in the rubbish. In visiting my workshop in 2000 Sarel Van Der Mewer saw the block and bought it from me for E750.00 for the sole purpose of using it in his offroad racing car. Engine No.: AAY108562*

Sarel Van Der Mewer ID: 5502145099081
Sarel's Workshop: 52MUNRCHISON
Street: Lady Smith 036 6310800..."

20. *Given the fact that the vehicle now had an engine which had been reported stolen the Police confiscated the entire vehicle. I tried to explain to them that the vehicle was purchased separately from the engine and these were put together. The police officers would not heed my explanation.*
21. *Whilst I have no difficulty whatsoever with the Royal Swaziland Police retaining the vehicle which I am prepared to remove and leave in their possession, they have no lawful access to retain the entire vehicle particularly because I can prove ownership of that vehicle and the engine sub-assembly which is purported to have been stolen, is not original engine of the motor vehicle.*
22. *In desperation, I then contacted Alpine Motors, the original dealer who sold the vehicle to Mr. Armitage.*
23. *They then furnished me with an email a copy of which is annexed hereto marked "CD5" in terms of which they produced from their records;*
 - 23.1 *the original description of the vehicle which includes the dealer code 2631 which is Alpine Motors; and*
 - 23.2 *The details of the client who purchased it including the engine and chassis number of the vehicle, this being Mr. Douglas Armitage. A copy of the letter is annexed hereto marked "CD6".*
26. *I submit that the actions of the 1st Respondent are unreasonable in the circumstances. The vehicle has not been stolen, has not been reported stolen and there is simply no basis whatsoever for continued detention of the vehicle.*
27. *To the extent that the Respondent requires the engine, I am prepared to remove the engine and leave it with them.*

[2] Respondent contest:

AD POINTS IN LIMINE

“4.1 The applicant is barred from instituting the present proceedings for lapse of time, regard being had to the provisions of Section 16 (4) of the Theft of Motor Vehicle Act 16/1991. In terms of the aforementioned proviso, an application to secure the release of a motor vehicle seized and detained under the Act has to be made within six months following seizure and detention thereof.

AD PARAGRAPH 20

9. Respondents aver that a part of the motor vehicle, **to wit**, the engine was tempered with and pursuant to tests conducted thereon, which rendered it stolen, they promptly seized the motor vehicle. All this was done within the ambits of the Theft of Motor Vehicles Act. Respondent aver further that upon examination of the said motor vehicle, it was discovered that not only the engine was tempered with but also some other parts of the motor vehicle had temperaments. I beg leave to refer the above Honourable court to Annexure ‘AG1’, which is a copy of the examination results.

AD PARAGRAPH 21

10. Respondents aver that the motor vehicle and the engine are regarded as one single entity and cannot be treated as distinctive parts so as to remedy Applicant’s problem. Further, the reports show that certain other parts of the motor vehicle are tempered with. In essence what the Applicant purports to be done is for Respondents to keep the tempered parts and give back to him what remains. This Respondents aver, would be a miscarriage of justice.”

The report reads:

“Suspected stolen vehicle : VW CARAVELLE MINIBUS
Hartebeeskop E/F /12/2009 : MANZINI E/F 6521/2009

1. The under mentioned m/vehicle was examined by Insp. Jele at Siteki, Swaziland on the 2009-10-20 with the following findings:

1.1 LICENCE NO. : SD 985 ZM
1.2 MAKE : IV W CARAVELLE MINI-BUS

- 1.3 MODEL : +-1994
- 1.4 COLOUR : BLUE
- 1.5 ENGINE NUMBER : AAY018565- Observation- the engine is clearly tempered with because the metal surface on which these numbers were stamped were filed off and new false numbers were re-stamped on. The current numbers are not the original numbers issued by the factory to this engine.
- 1.6 STAMPED VIN NUMBER: This motor vehicle does not have a stamped VIN number.
- 1.7 VIN TAG : AAVZZZ25ZRU004672- Observation – the original vin tag has been removed and replaced with the current false one. The current vin tag is not the original vin tag affixed by the factory to this motor vehicle.
- 1.8 WINDOW MARKINGS: 25RU004672- Observation– original windows of this motor vehicle has been removed and replaced with the current one. The current windows are not the original windows issued by the factory to this motor vehicle and does not maintain the originality of this motor vehicle.

2. Due to alterations doe on this motor vehicle, its original identity could not be established.
3. This is a final report.

Adjudication

- [3] The respondents have raised a point *in limine* that the dies has lapse for applicant to file his application. Section 16(4) of the **Theft of Motor Vehicle Act No.16 of 1991** reads:

“16(4) 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.”

- [4] In his replying affidavit, the applicant informs the court that the motor vehicle was detained on 16th October 2009 when he took it for registration,

owing to a new legislation calling upon motor vehicles in the Kingdom to be re-registered. The applicant, on his own showing further, informs the court as follows:

“6.4 It was only after some months of going back and forth with the Police Station that Detective Constable Dlamini again informed me that the vehicle had been stolen and that if I wish to have it released I should seek the services of an attorney. This was then round about June 2010. Immediately he informed me of this I then instructed my attorneys.”

[5] The application was then lodged in July 2010. These averments stand unchallenged by respondents. No application was made on behalf of respondents to dispute these assertions by the applicant. I consider them to be common cause. Respondents during hearing of this application did not raise this point. I consider it to have been abandoned by reason that the time for actual seizure and detention of the said motor vehicle was when the applicant was advised by the investigating officer that the motor vehicle had been stolen and that is June 2010. For this reason, the applicant was within time in filing the present application. The point *in limine* raised on behalf of respondents stand to fall therefore and is hereby dismissed.

Ad merits

[6] The applicant bases his application on the notion that as the engine is said to have been tampered with, only the engine must be seized. The balance of the motor vehicle ought to be released to him because he has shown that “*the motor vehicle*” was acquired through legitimate means.

[7] The investigating officer has clearly stated that the motor vehicle was seized in terms of the Theft of Motor Vehicle Act No.16 of 1991. This is

also appreciated by applicant as he sought to demonstrate that he had filed his application within the time frame stipulated by this Act.

- [8] Now one needs to turn to this legislation to determine whether the legislature intended such orders as sought by applicant to be granted. What is a motor vehicle in terms of the Theft of Motor Vehicle Act (The Act). Section 2 defines a motor vehicle as:

Interpretation

“2. *In this Act, unless the context otherwise requires –*
“motor vehicle” means any vehicle self-propelled by mechanical or electrical power adapted or intended to be used on roads for the purpose of conveying persons or goods and shall include any part of such vehicle.”

- [9] Now *in casu*, it is not in issue that the engine has been tampered with because the metal surface on which these numbers were stamped were filed off and new false numbers were re-stamped on “*as per South African Police Service report dated 12th July 2008.*”

- [10] This circumstance on its own gives the investigating officer full power to seize and detain the entire motor vehicle. The reason is that this component of the motor vehicle (stolen engine) renders the whole motor vehicle tainted. It cannot be allowed to find access in roads of the Kingdom. Allowing the applicant to keep the balance of the motor vehicle and police keeping the engine would defeat the whole purpose of the Act. Common sense tells us that a motor vehicle’s most identifying feature is the engine. If it is tainted and then removed, this would encourage theft of motor vehicle as everyone caught might apply to court for a release of those parts which have not been tampered with. It is the duty of the court not to grant

orders which might open floodgates of similar application which tend to defeat not only the legislative enactment but the criminal justice system.

[11] Applicant sought to give an explanation on how he acquired the engine. That is irrelevant. What is of material *in casu* is that applicant ought to explain the circumstances which led to the engine to be filed off the original number and re-stamping it with a false number.

[12] What exacerbates applicant's application is that not only the engine has been tampered with. The report further reflects a number of components in the motor vehicle which suggests that the motor vehicle is a subject of further crime. For instance, the motor vehicle has no stamped VIN number, its "*original vin tag has been removed and replaced with a false one.*" The original windows were removed. Applicant then decided to inform the court that this aspect of the report is incorrect. In all fairness, applicant cannot in one instance accept the finding of the report and in another expect this court to reject the same report. He cannot as we often say in our legal parlance, approbate and reprobate at the same time.

[13] In the foregoing, I enter the following orders:

1. Applicant's application is dismissed.
2. Applicant is ordered to pay costs.

M. DLAMINI
JUDGE

For Applicant : M. Dlamini of Cloete/Henwood/ Dlamini - Associated
For Respondents : W. Ndlela from the Attorney General's office