IN THE HIGH COURT OF SWAZILAND

(HELD AT MBABANE)

CASE NO.: 1427/05

In the matter between

NDLELENI MSIBI Applicant

and

THE COMMISSIONER OF POLICE First Respondent

THE ATTORNEY GENERAL Second Respondent

JUDGMENT DELIVERED ON: 18th SEPTEMBER 2006

CORAM: P.Z. EBERSOHN J.

For Applicant: MR. S.V. MDLADLA MBABANE

For Respondent: MR. S. DLAMINI FOR ATTORNEY GENERAL

JUDGMENT

EBERSOHN J:

[1] In this matter the applicant seeks an order by way of notice of motion to compel the respondents to release to him a certain Ford Bantam light delivery van with

registration number SD216HG.

[2] On the 23rd August 2004 a member of the Royal Swaziland Police, one constable Dlamini, stopped Velaphi Msibi, the brother of the applicant, who was driving the said vehicle. He told Velaphi Msibi that he wanted to check the vehicle. Velaphi Msibi told them that the vehicle had been checked on previous occasions by the Police whilst crossing the border into South Africa and when it returned to Swaziland. The police officer told him that the Police were detaining the vehicle as they were suspecting the vehicle to have been stolen. No basis for the suspicion was given. The vehicle was then driven to the Mbabane Police Station.

[3] Velaphi Msibi telephoned the applicant who in turn telephoned constable Dlamini and Dlamini requested him to come to the Mbabane Police Station the next day. The applicant went to the Police Station the next day where he was questioned and the applicant informed the Police that he purchased the vehicle and he showed them the documents of ownership. It is clear that the applicant orally requested the return to him of the vehicle. The Police then informed him that they were waiting for a police officer from South Africa to inspect the vehicle. He handed to the Police the Blue Book of ownership. The Police informed him that they would get in touch with him again.

[4] The applicant consulted his attorney who informed him that he should be patient and give the Police an opportunity to investigate the matter. The Police, however,

despite their promise, did not revert back to him.

[5] Annexure "NM1" attached to the founding affidavit by the applicant, is the Tax Invoice relating to the sale of the vehicle by Car Centre at Sir Motors to the applicant on the 5th December 2002 for E23 000.00.

[6] Annexure "NM2" to the applicant's papers is a copy of a deed of sale between one Frederick J. Hawley as seller and one John Sabelo Mncina as purchaser dated the 24th August 2001 in terms whereof Hawley sold the same vehicle to Mncina for E35 000.00.

[7] Annexure "NM3" is a supporting affidavit by Mncina verifying his purchasing of the vehicle from Hawley.

[8] Annexure "NM4" is a copy of the Blue Book relating to the vehicle in the name of one Dilizo Nhleko.

[9] On page 17 of the record appears a photocopy of the jearly renewals of the licence of the said vehicle. This reflects that the licence was renewed jearly as from 1998.

[10] Annexure "NM6" is a copy of a letter by the applicant's attorneys S.V. Mdladla & Associates dated the 26th January 2005 enquiring from the Police what the outcome of their examination was.

[11] An affidavit by Hawley was also attached to the papers wherein he confirmed that the vehicle was purchased by him from a firm called Prestige Cars and he attached a letter from Prestige Cars to his affidavit. He also stated in his affidavit that the vehicle was cleared by the Police when he sold the vehicle to Diliza Nhleko and he attached a copy of the Police Clearance as annexure "FH1" to his affidavit.

[12] The respondents filed opposing papers. Constable Isaac Dlamini deposed to the answering affidavit. He stated that he detained the vehicle on the 23rd August 2004 on suspicion that it was stolen. He stated that he detained it in terms of section 16(1) read with section 4(1)(b) of the **Theft of Motor Vehicle Act,** No. 16 of 1991 **("the Act").** Section 4(1) of the Act reads as follows (all quotations in this judgment are verbatim):

> **"4(1) Unless the contrary is proved by him, a person shall be presumed to have committed an offence under section 3 and, on conviction, punished accordingly if -**
>
> **(a)**
>
> **(b) the engine or chassis number or registration marks or numbers of the motor vehicle or other identification marks of the motor vehicle have been altered, disfigured, obliterated or tampered with in any matter(sic);"**

[13] Section 16(1) of the Act reads as follows:

> **"16(1) 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 that 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."

[14] Sections 16(3), (4), (5), (6) and (7) of the Act read as follows:

> **"16(3)A person arrested or a motor vehicle seized under this Act shall within a reasonable time not exceeding seventy-two hours be brought before a court by any officer of a rank of sergeant or above for the purpose of obtaining a warrant for the further detention of that motor vehicle".**
>
> 1. **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.**
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> 2. **Where, in any application under subsection (4), neither the police nor a third party objects to the release, the application, supported by the evidence, may be made orally and without prior notice.**
>
> 3. **A court shall issue a warrant for the further detention of a motor vehicle under this Act where there is a discrepancy in the ownership or lawful possession of that motor vehicle.**
>
> 4. **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 of lawful possession."**

[15] Attached to constable Dlamini's affidavit there is a document headed **"APPLICATION FOR DETENTION ORDER IN RESPECT OF A MOTOR VEHICLE IN TERMS OF SECTION 16 OF THEFT OF MOTOR VEHICLE ACT NO. 16 OF 1991".** The document is addressed to the magistrate of the Hlohlo region. The text of the application reads as follows:

> "APPLICATION IS HEREBY MADE FOR THE (sic) ORDER

AUTHORISING THE POLICE TO DETAIN A MOTOR VEHICLE DESCRIBED BELOW FOR THE PURPOSE OF ENABLING THE POLICE TO CARRY OUR (sic)INVESTIGATION TO ITS CONCLUSION"

The application, which was under oath, was deposed to before a commissioner of oaths only on the 12th October 2004, which was way outside the 72 hours stipulated in the Act. This delay was not explained by constable Dlamini in his answering affidavit.

[16] The application thereupon was apparently handed to a magistrate. Under the heading "REMARKS BY MAGISTRATE" there appears the following in the unidentified magistrate's handwriting:

> **"The motor vehicle with the above particulars is detained for a period of three (3) months for investigation."**

It bears the date stamp 11/10/2004. Something is obviously false. Either the magistrate erred by affixing a date stamp dated the 11th October 2004 on the document or the commissioner of oaths erred with regard to the date on which the affidavit was deposed to before him. It is, however, a problem of the respondents and it is not for this Court to try and establish what happened.

[17] It is clear that the applicant was not afforded his rights in terms of the audi alteram partem rule with regard to the application to the magistrate and it is also highly irregular that the magistrate granted the order without any grounds being advanced in the application why the vehicle should be detained. In this regard the magistrate clearly erred and this practice of granting detention orders at the behest of

the Police without any grounds being advanced in the applications for the detention thereof must cease forthwith. It is clear that the detention order was in any case null and void under the circumstances and the vehicle should after the expiry of the 72 hours have been returned to the applicant forthwith. This stipulation has the same effect whereby the Criminal Procedure and Evidence Act requires that an arrested person be brought before a Court within a stated number of hours. In South Africa it is for example 48 hours in terms of their section 50 of the Criminal Procedure Act, no. 51 of

1977. The authorities are clear that if this stipulation is not complied with by the Police the further detention becomes invalid and illegal. **(See R v Mtungwa** 1931 TPD 466; **R v Kanyanga** 1948 (2) SA 1997 (R)).

[18] It is not necessary to deal with the authorities with regard to the principle of audi alteram partem which the magistrate did not comply with before granting the detention order regarding the vehicle. They are clear. (See **Administrator, Transvaal, and Others v Traub and Others** 1989 (4) SA 731(A); **Administrator, Transvaal v Zenzile & Others** 1991 (1) SA 21(AD) at 34B; **Administrator, Natal v Sibiya & Another** 1992 (4) SA 532(AD) at 537G-538I; **Zwelibanzi v University of Transkei** 1995 (SA) 407(Tk); **President of Bophuthatswana v Sefularo** 1994 (4) SA 96(BA); **Langeni & Others v Minister of Health and Welfare & Others** 1988 (4) SA 93(W); **Minister of Health, Kwazulu Natal & Another v Ntozakhe &**

Others 1993 (1) SA 442(AD); **Yates v University of Bophuthatswana** 1994 (3) SA 815(B) at 836A-D; **Van Huysteen v Minister of Environmental Affairs & Tourism** 1996 (1) SA 283(C) at 30C; **Fraser v Children's Court, Pretoria North and Others** 1996 (8) BCLR 1085(T); **Minister of Education and Training & Others v Ndlovu** 1993 (1) S A 89 (AD) at 105 A H ; **Minister van Onderwys en Kultuur en Andere v Louw** 1995 (4) **SA** 383**(A); Yanta & Others v Minister of Education and Culture, KwaZulu Natal & Another** 1992 (3) **S A** 54**(N); Prans v Groot Brakrivier Munisipaliteit en Andere** 1998 (2) **SA** 770**(C); Baxter: Administrative Law** at page 540 and **Wiechers: Administrative Law** pages 122/125).

[19] The magistrate's "order" thereafter lapsed but on the 6th May 2005 another unidentified magistrate in his handwriting stated the following

"The order is extended for a further period of one month".

It is clear that the applicant was also again not afforded his rights in terms of the audi alteram partem rule and that this further detention order was also not supported by any evidence and was also invalid.

[20] It is clear that the Police unduly delayed the matter.

[21] Dlamini stated in paragraph 8 of his affidavit that he, without stating when he did it, conducted an investigation of the motor vehicle and that he applied etching acid on

certain parts thereof where numbers were stamped and concluded that they have been tampered with. He was, in this regard, giving expert evidence but no details were given by him in his affidavit of his expertise in this field and on what basis he could have concluded that the parts were tampered with. He also stated the following which is not really intelligible:

> **"Respondents leave of this Honourable Court to file the Confirmatory Affidavit of Detective Inspector De Jager to confirm certain averments pertaining to the results of investigations carried on the motor vehicle by him."**

[22] An affidavit by one G.W. de Jager was afterwards filed and served. I shall deal with this affidavit later herein.

[23] Paragraph 13 of the answering affidavit (which deals with paragraph 21 of the founding affidavit wherein the applicant stated that the police never advised him about developments in their investigation and wherein he stated that the vehicle was not stolen and should be returned to him) reads as follows:

> **"Contents herein are denied and the Applicant is put to the strict proof hereof.**
>
> **Respondents aver that the motor vehicle is presumed to be stolen as envisaged by section 41(b) of the Act as it has its engine and chassis numbers tampered with. The onus is on the Applicant to prove that he did not steal the motor vehicle.**
>
> **Respondents aver, further that as a result of the tampering done by Applicant on the motor vehicle, its true identity cannot be established. The numbers are not the ones issued by the factory which manufactured the motor vehicle, therefore it is not possible to say from whom the motor vehicle had been stolen. I beg leave of this Honourable Court to refer to**

annexure "ID2" being a copy of the results of investigations carried out on the motor vehicle by the South African Police Vehicle Identification Branch.

Wherefore I pray that it may please this Honourable Court to dismiss Applicant's application with cost."

[24] Annexure "ID 2" to the answering affidavit appears to be a letter from some police station in South Africa, signed by one Inspector G.W. de Jager, addressed to The Branch Commander of the Royal Swaziland Police Vehicle Branch. The letter purports to contain matters evidenced by an expert. The confirmatory affidavit by Inspector de Jager, to which I have already referred to, however, is a mere formal affidavit wherein no details were deposed to from which this Court could glean evidence that de Jager, or whoever, did the investigation, was an expert in the field. As such the letter and de Jager's affidavit were not admissible as proof and evidence of what it purported to convey to this Court.

[25] How and on what basis constable Dlamini could on his own aver that the vehicle was presumed stolen **"as it has its engine and chassis numbers tampered with"** is not clear. How and on what basis he, as an obvious lay person with no expert knowledge, as he clearly neither possessed the expert knowledge, nor alleged that he had such expert knowledge, could conclude that the numbers were tampered with, and ever more alarming, that it was the applicant that tampered with the numbers, boggles the mind. It is also strange that he stated that the vehicle's true identity could not be established. The source of that information was not proven in these proceedings.

[26] Clearly constable Dlamini, and for that matter, inspector de Jager, did not

consider the fact that the vehicle could have originated not from South Africa but some other country. As such their opinions about the vehicle being stolen is, furthermore, pure speculation and with no evidential value.

[27] It is also not explained in the answering affidavit why it was necessary to have the period of detention of the vehicle extended.

[28] The failures in the answering affidavit were put to counsel who appeared for the respondents but he could not come up with an explanation.

[29] He, however, argued that in terms of the Act the applicant could not claim back the vehicle as its numbers were tampered with and that the application should be dismissed because it was brought outside the six month period, and, so went his argument, that once a vehicle has been detained by the Police that was the end of the matter and that it would never be returnable except where a Court ordered otherwise. In this regard counsel apparently did not understand the purpose of the applicant's visit to the Police the day after the vehicle was taken to the Police station. It was no social visit on the part of the applicant but an endeavour to get his vehicle back and as such it was an application, albeit orally, for the return of the vehicle. It may be argued, but it was not done so in Court on behalf of the respondents, that section 16(7) of the Act only makes provision for the oral application to Court for the return of the vehicle but that would only be the case where the Police complied with the Act and a valid detention order was granted by a magistrate and section 16(7) did not remove the ordinary remedy of orally applying for the return of the vehicle where there was no

valid detention order granted. Counsel for the respondents also argued that once a detention order was granted by a magistrate it virtually endured for ever removing all rights the owner thereof had unless a Court ordered the return of the vehicle to the owner. It was put by the Court to him to then explain why the magistrate granted only a detention order for a period of 3 months and what the purpose of such an order by the magistrate was. His response was still the same and did not really assist the Court.

[30] This Court thus finds that the provisions of section 16 therefore did not apply where there was no valid detention order granted by a magistrate otherwise there would be a lacuna in the Act which would result in the owner whose vehicle, once being stopped and driven to the Police station, would never be entitled to get it back even if the Police did nothing further about the matter. To find otherwise would lead to uncertainty and virtually robbing owners of their rights to the possession of vehicles which they honestly purchased, as in this case, and to unbearable hardships facing the ordinary man in the street who would be delivered to the mercy and whims of a Police officer.

[31] Furthermore, the Police themselves delayed the filing of the application with the magistrate and as such the Police forfeited the protection the Act afforded them and the detention of the vehicle, if it ever was valid, became invalid and the applicant thereby became entitled to the return of the vehicle.

[32] Furthermore, even if I am wrong, this Court is entitled to condone the late filing

of this application which I entertain on the basis of the Police delaying the matter and thereby having lost the protection of the Act and also their failure to revert back to the applicant.

[33] Furthermore, it appears to be clear that constable Dlamini was on a fishing expedition when he requested that the vehicle be driven to the Police station and there was no basis for any "suspicion" when the applicant's brother merely drove the vehicle. In this regard the fact that the vehicle was checked on other occasions at the Border post also lends support for the applicant's contention that constable Dlamini had no cause to be suspicious and was apparently merely checking vehicles at random.

[34] It also is common cause that nobody has been arrested in connection with the alleged theft of the vehicle and no particulars of any charge having been laid in regard to such theft were put on record by the respondents.

[35] There appears to have been a general failure to comply with the basic principles of pleading on the part of the respondents in this matter.

[36] Another criticism is to be levied against the respondent with regard to the matter in general. Paragraphs [15], [16] and [17] of the judgment of **Ebersohn** AJ in case no. 297/2003 in the Transkei Division of the South African High Court in the matter between **Mnyungula v The Minister of Safety and Security and Others,** where the return of a vehicle seized by the Police under the similar South African enactment was successfully claimed, appears to be applicable in this matter too. They read as follows:

"[15] In his affidavit, Sonkosi, who seized the vehicle, averred that he formed his belief, as is required, on the following grounds:

(1) On the day in question whilst on duty at Bityi Location in the district of Umtata, he received a "tip" that the applicant was in the possession of a stolen vehicle. Needless to say there was no supporting affidavit by the alleged informant and his identity was also not disclosed by the respondents. No reliance could thus have been placed by sergeant Sonkosi on the "tip" as a ground for his "reasonable belief.

(2) He also stated: "I watched the vehicle and, at some stage, saw the driver thereof throwing the keys of the vehicle in the garden. My suspicion then became strengthened and the occupants of the vehicle looked suspicious." He did not elaborate on these averments. He didn't say where he was when be observed the vehicle and for how long his observations lasted. He also didn't state under which circumstances the applicant allegedly threw the keys in the garden and who the occupants of the vehicle, who were looking suspicious to him, were and what caused him to form a belief that they "looked suspicious", bearing in mind that after all it was Christmas day. These allegations by Sonkosi were vehemently denied by the applicant in his answering affidavit. Counsel for the respondents was unable to advance cogent argument as to how Sonkosi could regard these averments as a sufficient basis for his "reasonable belief.

(3) He admitted that when he asked the applicant as to the ownership of the vehicle the applicant informed him that he bought the vehicle from one Mtjongile. He stated further that the applicant, however, could not produce ownership documents of the vehicle and that the applicant told him that the documents were still with Mtjongile in Queenstown as he still owed money to Mtjongile on the purchase price and the vehicle was not yet registered in his name but is registered in the name of Mtjongile.

(4) He stated that he checked the chassis number of the vehicle and noticed that the number began with the letters "AAPV".

(5) He stated further that he then communicated with a superintendent Zono at the Umtata Police and asked him to "confirm whether the vehicle was stolen or not." He stated that Zono reverted to him and advised that according to the Police computer the vehicle was stolen in Durban on the 15th February 2002 and the theft was reported to the police under Umbilo Docket CR 359/2/2002.

[16] It is common cause that the Police have virtual immediate access to:

(1) the Police computer reflecting records and the contents of dockets and is based on information gleaned from complainants in cases;

(2) the National Traffic Information System ("Natis computer system"), brought into being in terms of s 4 of the National Road Traffic Act, No. 93 of 1996, and details of the registration and licensing of all motor vehicles are contained in this computer system; and

(3) details of all vehicles sold at Police auctions.

> **It is clear that if Sonkosi and Zono were prudent enough and caused the Natis computer system and the Police records to be checked, they would have had confirmation within a few seconds that Mtjongile purchased the vehicle at a Police auction and that the vehicle was in fact registered in Mtjongile's name on the 4th January 2001 and thus could not have been the vehicle stolen on the 14th February 2002, which was about 13 months later.**
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> **[17] In this regard the applicant attached as annexure "A" to his founding affidavit a copy of the official registration certificate issued to Mtjongile by the Natis computer system which proved:**
>
> **(1) that the vehicle was registered on the 4th January 2001 in the name of Mtjongile and**
>
> **(2) that it was a vehicle which was sold at a Police auction."**

[37] Why neither the Swaziland nor the South African Police checked their computers has not been disclosed by the respondents. Apparently here in Swaziland a practice has evolved whereby the Police randomly check vehicles and then in a casual manner, without having any expert confirmation or proof thereof, allege that the "numbers" on body parts were tampered with burdening the owners thereof with the onus to prove that the vehicles were not stolen, relying on the provisions of section 16 of the Act. It may or may not come as a surprise to the Swaziland Police that vehicles, some of them being stolen in the past, were being sold by the South African Police with tampered numbers and all, at Police auctions thereby conferring valid and legal

ownership in and to the vehicles to the purchasers thereof at the Police auctions.

[38] Furthermore, in so far as is necessary, I find that the applicant acquitted him of any onus of proof in this matter and that he has proven that the vehicle was not stolen and that he is entitled to the return thereof.

[39] I accordingly make the following order:

> 1. The respondents are ordered to return to the applicant the motor vehicle referred to in paragraph 1 of the notice of motion.
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> 2. The respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved, such costs to include all costs reserved and the costs of counsel, if any, are certified in terms of rule 68.

P.Z. EBERSOHN
JUDGE OF THE HIGH COURT