

THE HIGH COURT OF SWAZILAND

ZWAKELE NKUMANE

Applicant

And

ATTORNEY GENERAL

1st Respondent

COMMISSIONER OF POLICE

2nd Respondent

Civil Case No. 899/2003

Coram

For the Applicant

For the Respondents

S.B. MAPHALALA – J

MR. J. MASEKO

MR. DLAMINI (Attached
to the Attorney General's
Chambers)

JUDGEMENT

(4/11/2003)

Before court is an application brought under a certificate of urgency for an order *inter alia* directing the 2nd Respondent to release to the Applicant a motor vehicle presently detained at Lobamba Police Station or wherever it may be. The motor vehicle is a

Ford Courier, a 1987 model with engine no. F6 – 265753, chassis number NR-236219 and registration number SD 757 PG.

The founding affidavit of the Applicant is filed in support of this application. A confirmatory affidavit of one Musa Hlophe is also filed. Annexure “21” being a court order by this court (*per Sapire CJ*) dated the 28th May 1999, is also filed in support thereto. Annexure “22” being extracts of a Blue book is also filed.

The Swaziland Government opposes this application and the answering affidavit of one 3167 Detective Constable Batinisty Mamba is filed. The said officer is the Investigating Officer in this case. Various annexures are filed viz “B1” being change of ownership, “B2” a detention order in respect of a motor vehicle in terms of Section 16 of the Theft of Motor Vehicle Act No. 16 of 1991; and “B3” a police report by the South African Police Service compiled by a certain Inspector S.W. De Jager (0089888). Confirmatory affidavits of 0621520 Detective Inspector A.Z. Phiri and by Detective Inspector De Jager are also filed in opposition.

The Applicant alleges that he is the lawful owner of the said motor vehicle. He avers that the said motor vehicle was previously bearing registration number, SD 473 IL and was changed to the present registration number by one Musa Hlophe, a prospective buyer of same. The said motor vehicle was once impounded by members of the Royal Swaziland Police force on suspicion that it was stolen. The matter came before this court which ordered that the motor vehicle be released to him as he was the sole lawful owner of the motor vehicle. A copy of the court order in Case Number 1833/98 is annexed as “21” of the Applicants founding affidavit.

The Applicant further avers that he thereafter purported to sell his motor vehicle to one Musa Hlophe and as such the motor vehicle is presently registered in his name. In this regard he attaches annexure “22” being a copy of the registration book. He avers that he is still the lawful owner of the motor vehicle in question since the said Musa Hlophe has not fully paid the purchase price. It was agreed between them that ownership would transfer from seller to the buyer upon the latter paying the full purchase price.

During the month of August 2003, his motor vehicle was impounded by one Mr. Mamba, a police officer attached to the Car Theft Unit. The car was impounded on suspicion that it was stolen. The said Mr. Mamba promised to release the motor vehicle to Musa Hlophe upon conclusion of the investigations. To date the said Mr. Mamba is refusing to advise Musa Hlophe of the results of the police investigations.

Consequently, the Applicant believes that police investigations have been finalized but Mr. Mamba is wrongfully refusing to release his motor vehicle.

At paragraph 13.1.1, 13.2 and 13.3 he alleges urgency.

Musa Hlophe in his confirmatory affidavit confirms that the motor vehicle was impounded by one Mr. Mamba, a police officer based in the Manzini Police Station and attached to the Car Theft Unit. Hlophe further confirms that the said Mr. Mamba has to date not advised him of the results of the police investigations in respect of the impounded motor vehicle.

On the other hand Detective Constable Mamba in the Respondents' answering affidavit denies that the Applicant is the lawful owner of the motor vehicle in that Applicant failed to furnish proof of ownership of same. He avers that the motor vehicle in question was brought before him by one Eric Matse for a police clearance. He inspected the registration book (blue book) with number 116170 where he noticed that it reflected the same official stamp. This raised a suspicion that it was stolen. The officer further avers that they do not have the original registration book in their possession.

He then went on to inspect the motor vehicle where he noticed that the engine numbers were tampered with. The engine block had been ground and the numbers F 626575 were re-stamped on the ground surface. The stamped engine number did not follow a straight line, thus strengthening his suspicion that the motor vehicle was stolen.

He further noticed that the tag numbers were not original in that they were also re-stamped on the chassis of the vehicle with numbers NDAYL 0101 NR 236219. He

noticed that the tag itself was damaged when it was re-fitted. The corners of the tag were out of position and that it had a dent around reverts.

As a result of the above the officer seized and detained the said motor vehicle in terms of Section 4 of the Theft of Motor Vehicles Act No. 10 of 1991. After the seizure of the motor vehicle a detention order was sought for and was granted by the Senior Magistrate (Manzini) on the 5th May 2003.

Upon further investigation in collaboration with the South African Car Theft Unit personnel, namely Detective Inspector Phiri the results therefrom have indicated that the identification numbers of the motor vehicle had been obliterated and changed and false numbers inserted on the engine and the chassis. This is reflected in annexure "B3" being a report by the South African Police Service compiled by one Inspector De Jager on the 11th May 2003.

On the question of urgency the officer denies Applicant's contention that the reason why the matter should be treated as one of urgency is that the motor vehicle is kept at the open thus exposed to sun and rain. The motor vehicle in question was seized during the month of August 2002. In any event, he avers that the Applicant has failed to satisfy Rule 6 (25) (b) of the High Court Rules.

When the matter came for arguments *Mr. Maseko* applied that the affidavit of Detective Inspector De Jager be struck out as it was attested before a Pupil Crown Counsel contrary to the provisions of the Commissioner of Oath Act. The said affidavit was thus struck out with the consent of counsel for the Respondent.

On the merits *Mr. Maseko* contended that before the motor vehicle was impounded by the police the Applicant was in lawful possession of same by virtue of a court order annexed in his founding affidavit and marked "21". The motor vehicle had been previously impounded by the police on suspicion that it was stolen. The fact that the engine number was tampered with was addressed by the court and notwithstanding that, the court ordered that the motor vehicle be released to him. Further that Section 4 of the Theft of Motor Vehicle Act does not apply in this matter because the motor vehicle had been released to him by the court after it was satisfied that the motor

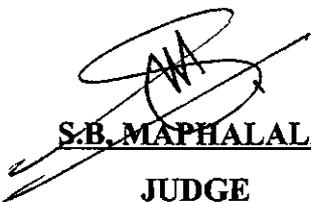
vehicle ought to be released to him. As to annexure "B" (detention order) referred to by the Respondent he contended that it is a nullity and has no legal force and effect by virtue of the fact that it was not procured in compliance of Section 16 (1) (3) of the Theft of Motor Vehicle Act/1991.

The arguments advanced *au contraire* on behalf of the Respondent revolved around the opposing papers. The gravamen of the defence is that the said motor vehicle was seized in terms of Section 4 of the Theft of Motor Vehicle Act.

It appears to me that indeed the motor vehicle was seized and detained in terms of Section 4 of the Theft of Motor Vehicle Act No. 16 of 1991. There is evidence before me that after the seizure of the motor vehicle a detention order was sought for and granted by the Manzini Senior Magistrate on the 5th May 2003. I accept what was said by counsel for Respondent that the detention order filed in the papers does not show the various extensions before the learned Magistrate subsequent to the order of the 5th May 2003. I have no reason to hold that counsel for the Respondent is not being truthful to the court in this regard.

It appears to me further that the investigations by the local police officers in collaboration with their South African counterparts is underway in respect of this motor vehicle.

For the above reasons I dismiss the application with costs.


S.B. MAPHALALA
JUDGE