

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

**CIV/A/34/2020
CIV/APN/MSU/66/20**

In the matter between

O/C RCTS

1ST APPELLANT

COMMISSIONER OF POLICE

2ND APPELLANT

ATTORNEY GENERAL

3RD APPELLANT

AND

LEFU MOLAOA

1ST RESPONDENT

HIS WORSHIP MURENZI

2ND RESPONDENT

CLERK OF COURT (MASERU MAGISTRATE COURT) 3RD RESPONDENT

JUDGEMENT

Neutral Citation: O/C RCTS & 2 Others v Lefu Molaoa & 2 Others
CIV/A/34/2020 [2022] LSHC 4

CORAM: BANYANE J

HEARD: 26/03/21

DELIVERED: 04/03/22

Summary

Appeal against an order of magistrate releasing a motor vehicle seized in terms of section 14 of the Motor Vehicle Theft Act of 2000 - pre-conditions of release - whether lawful possession or ownership proved absent a written agreement of sale, transfer documents and registration documents-judgement of the court-a-quo insupportable - appeal upheld.

ANNOTATIONS

Cases cited:

1. Asman v His Worship Magistrate Makara CIV/APN/466/2004
2. Crown v His Worship Mr Murenzi and Others CRI/REV/0018/14
3. Maganda v Her Worship L. Ntelane and Others CIV/A/11/05
4. Makakole v Officer Commanding CID Maseru & Another LAC (1985-89) 209
5. Takalimane v Serobanyane C of A (CIV) 26/2011
6. Director of Public Prosecutions v Mofubetsoana LAC (2009-2010)79

Legislation

1. Motor Vehicle Theft Act 2000

Introduction

[1] This is an appeal against the decision of the Magistrate Court for the District of Maseru made on the 10th December 2020 in CIV/APN/0066/2020, in terms of which his Worship Murenzi ordered release of a certain vehicle to the respondent herein.

Background

[2] The facts that precipitate this appeal are briefly as follows. Sometime in February 2020, police officers seized from the 1st respondent's possession and impounded a certain vehicle described as a Ford Ranger Bakkie, bearing Registration Number KH57GMGP. It is common cause that in June 2020, the 1st respondent as applicant approached the Magistrates' Court seeking release of this vehicle.

[3] In his founding affidavit filed in support of this application, he averred that prior to the seizure, he has been the rightful owner and possessor of the vehicle, which ownership and possession are founded upon a sale agreement concluded with its previous owner Cynthia Thomas Subramoney.

[4] The grounds for seeking release of the vehicle were that; **a)** he was not apprised of the cause of the seizure nor impounding, **b)** no criminal proceedings were instituted against him; **c)** the continued confiscation of the said vehicle is prejudicial to him because it was used as a business vehicle and as his mode of transport to and from work; **d)** the vehicle is exposed to open sunlight and hazardous weather elements which may result in its deterioration and decline of its market value.

[5] To this application, he attached a certificate of registration bearing the names Subramoney CT as owner of the vehicle as well as an identity document in Cynthia's names.

[6] The application was vigorously opposed by the appellants. In an opposing affidavit filed by Police Constable Mphuthing, who described himself as the Investigating Officer in a case involving this vehicle, the lawfulness of possession is disputed. He avers that during a joint operation conducted by officers under the command of Officer Commanding Robbery and Car Theft Squad and the Commissioner of Police together with members of the South African Police Service, it was discovered that this vehicle had been tempered with. He avers further that the investigations revealed that the vehicle was stolen on the 17th November 2019 at Monte Casino Parking at Sandton in South Africa from its lawful owner Ryan Etzinger of South Africa. He attached a computer printout issued by Warrant Officer Coetzee of Ladybrand.

[7] He avers that both the vin and engine number of the vehicle had been tempered with thus the vehicle now bears false numbers which replaced the true and original numbers. To substantiate this, he attached the etching report issued by Constable Moloji in terms of which it is averred that the original numbers were scratched off and replaced with the false numbers.

[8] Regarding non-institution of criminal proceedings, he avers that they have located the true owner of the vehicle and that arrangements to have him cross over to Lesotho to identify the vehicle were hindered by the cross-border movement restrictions imposed by both countries in an endeavour to curb the spread of corona virus.

Judgement of the Court a quo

[9] In the opinion of the learned Magistrate, the application was based on *rei vindication*. He thus identified the issue for determination as “*whether the applicant proved on a balance of probabilities that he is the lawful owner and possessor of the vehicle.*”

[10] He considered the registration certificate in the names of Cynthia Thomas Subramoney reliable and stated that the respondents challenged the authenticity without bringing proof in support of their objection. He reasoned that the oral deed of sale is valid as long as it aligns with the elements of a written contract.

[11] He also placed emphasis on Constable Mphuthing's affidavit. He reasoned that it is oblique on whether he was personally involved or made observations or whether the LMPS made its own independent findings on the alleged tempering since detention of the vehicle.

[12] While acknowledging that the affidavit prepared by Moloï is admissible, he reasoned that the mere fact that a person deposed to an affidavit does not absolve him from testifying in Court. He cited the case of **Asman v His Worship Magistrate Makara** (as he then was) **CIV/APN/466/2004** to buttress the point that Rules against hearsay are applicable in motion proceedings.

12.1 He concluded as follows;

"I am mindful of the fact that, the law against the notion of Courts releasing the motor vehicle suspected on reasonable grounds to have been tempered with. The use of motor vehicle with tampered chassis and engine numbers on a public road is unlawful but the question still remains whether on balance of probabilities the police have proved that seizure and detention is justified without the supporting affidavits of SAPS Constable Coetzee, if the LMPS themselves made a finding that the chassis and engine numbers has been grounded (sic) following its seizure, would in my opinion, excise or justify the detention thereof. The annexures A & B filed by the respondents (police without supporting affidavits are insufficient to induce reasonable suspicious regard being had to their failure to criminally charge the applicant in relation to the vehicle subject matter, one would assume the vehicle is therefore not needed in a Criminal Court as exhibit."

[13] The learned Magistrate under paragraph 6 of the Judgement justifies why he was persuaded that the applicant was the lawful owner of the vehicle. He stated as follows;

“To prove ownership, applicant attached the identification and registration certificate in the names of Cynthia Thomas Subramoney (Annexure VM1) who he alleges to have entered into an oral sale agreement with. The respondent challenges the authenticity of the same registration without bringing anything to proof otherwise. The applicant in his founding affidavit averred that he did not have a written deed of sale but at a later stage he filed a deed of sale dated 25th March a date after confiscation (February 2020) of the vehicle. In my view, this deed of sale, not at all mentioned, either in the founding affidavit or replying affidavit is an afterthought and cannot be regard as part of evidence. However, oral deed of sale is still valid as long as it aligns with the elements of a lawful written contract. In so far as the respondents only made allegation that Annexure VM1 is not authentic without proof, then, it remains reliable.”

Grounds of Appeal

[14] The appellants impugn the judgement of the Court-a-quo on a number of grounds. They contend that the learned Magistrate erred and misdirected himself by;

- a) Holding that the respondent proved lawful ownership of the motor vehicle notwithstanding lack of documentary evidence to support the application.
- b) Holding that the appellants failed to prove on a balance of probabilities that the seizure and impounding of the vehicle was lawful on the basis that evidence adduced by the appellants was insufficient.
- c) Ordering that the vehicle be released to the applicant despite the evidence presented by the appellants to the effect that the vehicle had been tampered with and reported stolen.
- d) By rejecting the documents tendered by the appellants as evidence on the basis that it is hearsay evidence.

Parties Submissions

[15] The appellants strongly contend that the vehicle was seized and impounded on grounds that it has been stolen and tempered with.

[16] For the reason that the applicant claims ownership and lawful possession on the basis of an alleged sale agreement without producing the agreement or transfer documents of the vehicle in his names, he failed to provide relevant documentary evidence before Court, thus failed to discharge the onus of proof placed on him by section 14(3).

[17] They relied on section 14 of the Act and the case of **Crown v His Worship Mr Murenzi and Others CRI/REV/0018/14** in support.

[18] The 1st respondent's counsel on the other hand relied on the case of **Maganda v Her Worship L. Ntelane and Others CIV/A/11/05** to submit that in the absence of better documents proving ownership by a different person, an applicant discharges the onus of showing that he is the owner or at least, bona fide possessor. That even if change of ownership has not been effected, where a person claims to be in lawful possession and produces undisputed proof, the article should be returned to such a person.

[19] He further referred me to **Makakole v Officer Commanding CID Maseru & Another LAC (1985-89) 209** to submit that where a suspect is not brought to Court within a reasonable time, the detention of a vehicle seized would not be justified and it must therefore be released to a bona fide possessor or the person in whose possession it was at the time of seizure.

Consideration of the Appeal

[20] The first ground of Appeal shall be considered as it is dispositive of this appeal. It is whether the learned Magistrate erred in holding that the respondent proved lawful ownership of the motor vehicle.

[21] To determine this ground, provisions of the Motor Vehicle Theft Act of 2000 regulating release of motor vehicles and possession of relevant documents by the buyer must be interpreted. I start with section 14, under which the vehicle was seized. Section 14 of the Act provides;

“14 (1) Any police officer may, without a warrant, stop, arrest and search any person found driving, or in possession, or in charge, or control of a motor vehicle if he believes, on reasonable grounds, that the vehicle is a stolen vehicle, whether or not that person has stolen it himself, or received it knowing or having reason to believe it to be stolen, or has assisted in stealing the vehicle, and may seize the vehicle and any documents relating to it.

(2) A police officer who has arrested any person or seized any motor vehicle in accordance with the provisions of subsection (1), shall, as soon as possible, take that person and that vehicle, and any documents seized relating to the vehicle to the nearest police station.

(3) Where a motor vehicle seized under this section is taken before a court for the purpose of a prosecution in respect thereof, the Court shall not release such vehicle until the conclusion of any such prosecution, and unless, within 6 months of the date of such conclusion, or the date of seizure of the vehicle, whichever is the later, application is made for such release supported by satisfactory documentary proof of lawful ownership or lawful possession thereof, and if, at the conclusion of such period of 6 months the vehicle remains unclaimed it shall be handed back to the police to be dealt with as an unclaimed vehicle in accordance with the provisions of section 19.”

[22] It is explicit in these provisions that where the vehicle is, on reasonable grounds, suspected to be a stolen vehicle, a police officer is

authorized in terms of section 14(1) to seize such a vehicle under the circumstances. **Takalimane v Serobanyane C of A (CIV) 26/2011.**

[23] As correctly pointed out by the 1st respondent's counsel, detention of a vehicle seized must be for purposes of prosecution of the relevant offence. In other words, the detention must be purposeful and that if a stage is reached when the detention appears no longer to be purposeful, there can surely be no point in continued detention of the property. This is the reason why the vehicle was released to the applicant in **Makakole v Officer Commanding CID Maseru and Another LAC (1985-89) 207 at 209 I-J.**

23.1 It should be noted however that the case was decided prior to promulgation of the *Motor Vehicle Theft Act of 2000* which requires an applicant to produce documentary proof of ownership or possession. The distinction is important because the vehicle was released to an applicant on grounds that he was a bona fide possessor of the vehicle for reasons set out in that judgement.

[24] For purposes of the Motor Vehicle Theft Act; the requirements for release are clearly set out. The test is whether the person seeking release satisfied the Court on lawful ownership or possession.

[25] This, in my view is the epicenter of the dispute between the parties. Even without deciding the issues whether or not the etching report and computer-generated documents are admissible without perhaps supporting affidavits of the persons responsible for their authorship or production, the inquiry should be whether the 1st respondent supported his application for release with satisfactory documentary proof of lawful ownership or possession. I think not for reasons that follow.

[26] It is undoubtedly clear in section 14(3) that a person seeking release of a seized motor vehicle must support his application with satisfactory documentary proof of lawful ownership or lawful possession.

[27] This provision places an onus on an applicant to persuade the Court through production of satisfactory documentary evidence that he lawfully owns or possesses the impounded vehicle. **The Crown v his Worship Murenzi**(supra).

[28] Section 7 of the Act deals with Disposal and purchase or sale of motor vehicle. Subsection 2 places an obligation on the buyer of a vehicle upon purchase, receipt or acceptance of delivery of the vehicle *to demand and receive from the seller, a document effecting such purchase, transfer or delivery*. It criminalizes failure to do.

[29] Section 7, in my view demonstrates the type of satisfactory documentary proof of lawful ownership or possession that is envisaged or contemplated under section 14, regard being had to the circumstances obtaining in this case i.e the basis for the claim of ownership of this vehicle is a sale agreement. Clearly, mere possession of the alleged owner's ID copy or alleged Registration Certificate (I say alleged because the authenticity of the latter is vigorously disputed by the appellants) fails to meet the sections 7 and 14 requirements in my view. Such possession is neither prima proof nor conclusive proof of purchase.

[30] In **Director of Public Prosecutions v Mofubetsoana LAC (2009-2010)79**, the Court of Appeal dealt mainly with the question whether the respondent there succeeded in proving ownership of the vehicle in question (Although the court was not dealing with section 14 of the Act under scrutiny). I should mention that the respondent there was in possession of a registration card of the vehicle.

30.1 In rejecting the respondent's document (in the light of documentary evidence of his adversary to the claim of ownership) stated at p81, para 6 that such registration card amounts to no more than prima facie proof of ownership. Further that there are many ways in which registration can be achieved without proper proof of ownership of a vehicle. That An enquiry must therefore be made as to precisely when, where and from whom he acquired the vehicle and that proof of purchase must be produced.

[31] In the instant matter, neither a deed of sale nor transfer document was handed by the 1st respondent. This is my view was fatal to his application. The learned Magistrate therefore erred in my view by relying on the alleged oral agreement when the law unequivocally obliges the buyer to demand before accepting delivery, a document effecting transfer.

[32] The learned Magistrate held further that the detention of the vehicle was unlawful. The circumstances leading to detention of the vehicle by the police are explained in the affidavit of Police Constable Mphuthing. He states that the prospective complainant lives in South Africa and he has not been able to cross over to Lesotho to identify the vehicle due to covid-19 bans or restrictions prevailing at the material time.

[33] To test the veracity of these allegations, one should have regard to the fact which I take judicial notice of, that the Honourable the Prime Minister declared a state of emergency in terms of legal notice No 26 of 2020 dated 27th March 2020, a period of less than a month after seizure of the vehicle. Movement restrictions inter countries only eased around October during that year.

[34] It is not doubted therefore that when the applicant sought release of the vehicle on grounds of non-prosecution in June 2020, indeed the lockdown regulations for each country restricted movement. In the circumstances, minimum fault can be placed at the door of the police.

Their hands, so was everyone else's, were tied. They could not therefore be expected in my view to bring the accused person before Court without ascertaining that indeed there is a complainant thus, informing their decision on whether to charge the respondent with theft of the vehicle or prefer any other charge allowable under the Motor Vehicle Theft Act of 2000 or the Penal Code of 2020.

[35] On this basis, I am unable to agree with the learned Magistrate that the detention is unlawful, nor am I persuaded that a stage has been reached when the detention could be said to be no longer purposeful.

[36] I should not be understood to be saying the police are entitled to retain / detain the vehicle for as long as they wish. The principle of purposeful detention prevails. The police must endeavor to finalize investigations as promptly as is reasonably possible in the circumstances of each case and bring suspects before Courts. Their failure to so, without a valid excuse would not justify a further detention of the vehicle.

[37] On the basis of the foregoing, I have therefore come to the conclusion that;

- (a) Possession of someone's ID and Registration Certificate (authenticity of which is vigorously challenged by the police), is not prima facie let alone satisfactorily proof of lawful ownership of a vehicle.
- (b) Without a document from the alleged seller effecting the alleged sale and transfer, I am not persuaded that the applicant provided proof that such agreement was concluded, worse still no details are given on when, how and in whose presence the alleged agreement was concluded. The applicant gives a sketchy or scanty facts surrounding the alleged sale yet this forms the foundation of his allegation of lawful ownership.
- (c) In the light of the conclusion reached above, which disposes this appeal, I need not interrogate other grounds of Appeal on

whether or not the evidence presented by the appellants in the Court a quo was admissible.

[38] For reasons stated, the judgement of the Court a quo is insupportable.

Order

[39] The following order is therefore made;

- a) The appeal is allowed with costs.
- b) The order made by the Court a quo is set aside and substituted with the following; “The application is dismissed with costs.”

P. BANYANE
JUDGE

For Appellant: Adv. Nkuebe

For 1st Respondent: Adv. Mohanoe