

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

EDWARD LEPHATSOE

Appellant

V

THE OFFICER COMMANDING  
L.M.P. - OUTHING

Respondent

J U D G M E N T

Delivered by the Hon. Mr Justice B.K. Molai  
on the 27th day of August., 1986.

This appeal is from the Subordinate Court of  
Outhing.

It appears from the record of proceedings that, on  
25th December 1983, the appellant (hereinafter called the  
applicant) filed with the clerk of the magistrate's court,  
Outhing, a notice of motion in which he prayed for an order,  
against the Respondent, in the following terms :

- "(a) that motor vehicle registration number DZB 602T  
be restored to the custody of the applicant  
forthwith;
- (b) that the said motor vehicle number DZB 602T  
be not removed from Lesotho for a period of  
(six) 6 months should the Respondent require  
it in connection with any prosecution;
- (c) that Respondent pays the costs of this  
application should he oppose it."

The Respondent intimated his intention to oppose  
the application. The founding and the answering affidavits  
were filed by the parties. No replying affidavit was,  
however, filed by the applicant.

/Briefly

Briefly the facts that emerged from the affidavits were that some time in 1983 the police found the vehicle, the subject matter of this case, in the possession of one Sipho Mabusa who could not produce, on demand, any document covering the vehicle nor could he give a satisfactory explanation as to how he had acquired possession thereof. The vehicle was seized and retained by the police from Sipho Mabusa.

In their investigations, the police found that the vehicle, in fact, belonged to one Peter Crnecuis Buitendach of Kibler Park Johannesburg in the Republic of South Africa from where it had been stolen on 31st January, 1983. Sipho Mabusa was then criminally charged with theft of the vehicle under CR. 62/83. However, he was subsequently released on bail. Copies of both the charge sheet and the bail forms were annexed.

Whilst the Criminal charge against Sipho Mabusa was pending the applicant brought the application for an order as aforesaid on the ground that the vehicle belonged to him and had always been in his possession. The trial magistrate dismissed the application but made no order as to costs. It was against the magistrate's order of no costs that the Respondent appealed to this Court on the ground that it was a misdirection on the part of the magistrate not to have awarded him the costs. The applicant also cross-appealed on the grounds that the Respondent had failed to establish either legal possession or ownership and viva voce evidence should have been ordered by the magistrate.

On the facts, there can be no doubt that Sipho Mabusa

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was criminally charged with theft of the vehicle, the subject matter of this case, which was naturally used as exhibit in CR 62/83. That being so, the Respondent no longer had the right to release the vehicle. That was the matter for the decision of the trial magistrate at the conclusion of the criminal case which had been preferred against Sipho Mabusa -- See S. 56 of the Criminal Procedure and Evidence Act, 1981.

On the first ground of cross-appeal it is to be borne in mind that it was the applicant and not the Respondent who claimed legal possession and ownership of the vehicle. In his answering affidavit the Respondent disputed that claim and averred that the vehicle had been seized from the possession of Sipho Mabusa who was subsequently charged with its theft as indicated by the annexed charge sheet. No replying affidavit was filed by the applicant to gainsay the averment of the Respondent on this point.

Granted that the question of legal possession and/or ownership was raised by him the applicant, and not the Respondent, bore the onus of proof on the well known principle that he who avers bears the onus.

As regards the second ground of cross-appeal viz. that the trial magistrate should have ordered viva voce evidence to be adduced, it seems to me that depended on whether or not a fair decision could be reached on the evidence established by the affidavits. It has already been pointed out that the release of the vehicle which was used as exhibit in a pending criminal case was a matter for the decision of the trial magistrate at the conclusion of that criminal case in terms of the

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provisions of S. 56 of the Criminal Procedure and Evidence Act, supra. It was therefore unnecessary to bring the application before the conclusion of that Criminal case. In that event the trial magistrate could have no difficulty in reaching a fair decision by dismissing, as he did, the application which was clearly brought before the Court prematurely.

Coming now to Respondent's ground of appeal that the trial magistrate misdirected himself by not awarding him costs, it is trite law that the question of costs is a matter within the discretion of the Court. That discretion has, however, to be judicial i.e. it must be based on some reasonable grounds. In his written reply to the grounds of appeal the trial magistrate had this to say on the issue : "It was not necessary to award costs as applicant still had a right to make another application if he has enough grounds."

The general rule is that costs follow the event. The fact that the applicant was, at some later stage, likely to approach the court with another application could not, in my opinion, have established a reasonable ground on which to deny costs to a successful party in a case with which the Court was seized. I am convinced that the magistrate's denial to award costs in the circumstances of this case was unreasonable departure from the general rule and for that reason an irregularity.

In the premises I would allow the appeal and dismiss

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the cross-appeal with costs to the Respondent in both  
the magistrate and the High Court.

  

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J U D G E.

For Appellant : Mr. Mafisa  
For Respondent : Mr. Matlhare.