CIV/APN/293/94

IN THE HIGH COURT OF LESOTHO

In the matter of :

KHOJANE BOHLOKO	APPLICANT
v	
COMMISSIONER OF POLICE	1ST RESPONDENT
THE ATTORNEY GENERAL	2ND RESPONDENT

JUDGMENT

Delivered by The Honourable Mr. Justice T. Monapathi
on the 21st day of August, 1995

The First Respondent's deponent TSELISO JOHN MONYOBI (Monyobi) was a police officer of the Royal Lesotho Mounted Police, under the First Respondent, stationed at Roma. At the material time he held the rank of a sergeant. He was the investigating officer in connection with the seizure and impoundment of the Applicant's vehicle which is disputed in this application. In his answering affidavit he denies that the seizure of the Applicant's vehicle registration CE 34137 was unlawful. He stated further that the vehicle did not belong to the Applicant. It was however not denied that the vehicle was seized from the

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Applicant during or about March 1991.

Monyobi goes further to say in paragraph 6 of the answering affidavit that: "....the said vehicle was seized by his officers after obtaining credible information that the said vehicle was stolen property": Furthermore, that the Applicant had denied ownership of the vehicle and informed Monyobi and his fellow officers that the vehicle belonged to his friends from Soweto, who had left it with him as security for the loan of Three Thousand Rand (R3,000.00) which he had advanced to those friends. Monyobi became most surprised that the Applicant was (in these proceedings) claiming the vehicle as his property because he (Applicant) had failed to produce any documents relating thereto and had alleged that the vehicle did not belong to him.

Monyobi clearly admits that the Applicant had not been charged as at the date of the 24th October 1994 when he deposed to his affidavit. His reason was that the Applicant had informed Monyobi and his fellow officers that the vehicle did not belong to him. The vehicle was therefore seized awaiting the Applicant to bring his friend from Soweto whom the Applicant alleged was the true owner of the vehicle. Monyobi denied that the detention of the vehicle has lost purpose "as we still await its claimant."

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I have reasons to underline the quoted portion which is found at paragraph 7 of the Answering Affidavit. One of the reasons is that it does not make sense.

I did not find it difficult to believe the Applicant. If it was true that the deponent had credible information that the vehicle was stolen such information would have been the information upon which the Applicant would have been liable to be charged. At least he would be charged as the person who was in unlawful possession of the vehicle in contravention of section 343 of the Criminal Procedure and Evidence Act 1981. The section reads:

> " 343 Any person who is found in possession of any goods other than stock or produce as defined in the Stock Theft Proclamation 1921, in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of the possession, is guilty of an offence and liable to the penalties which may be imposed on a conviction of theft."

Alternatively the Applicant would have been charged with outright theft if this alleged credible information really suggested anything of that nature. It is fair therefore to suspect that the Respondents had an unsound or a less than

honourable reason for not charging the Applicant. Indeed the Respondents were content not to disclose any facts or circumstances with which to seek to persuade this Court of the basis or nature of this alleged credible information. If such information was disclosed one would then have been inclined to take the next step being to think seriously about the submission by the Applicant that "in any event the alleged credible information is but hearsay which is inadmissible and I shall ask my Counsel to ask the Honourable Court to expunge". But now the question is what are these facts or information that I am being asked to expunge? If it is the bold statement of Monyobi about the existence of credible information I have no hesitation in pronouncing, and declaring the statement as being of no value.

In their reply the Respondents clearly do not appreciate the need for sufficiency of evidence even in application proceedings. It is on the basis of some facts or information that the Respondents (as Respondents) may ask the Court to find for them or reject the Applicant's story. It is on the basis of such allegedly credible information that the Respondents felt that they were entitled to hold on to the vehicle and detain it for the period of three and half years without charging the Applicant or releasing the vehicle to him. I find that the

detention was not purposeful. The period of detention of the vehicle was too long and the delay was unreasonable. Justice delayed is justice denied. The police know that they are duty bound to respect the liberty, life and property of people. The police and the Courts are entitled to hold to the property of a suspect: "so long as may be necessary for purposes of any examination, investigation, trial or inquiry .... see section 174(4) of the Constitution of Lesotho under the heading Freedom from Arbitrary seizure of property" as quoted by Maqutu J in KEKELETSO MOKOKOANA vs O/C POLICE AND ANOTHER CIV/APN/144/94 3rd March 1995 (unreported). But there was yet another reason for the detention of this vehicle that seemed to be unrelated to the desire of the Respondents to charge the Applicant for some or any of the offences known to our criminal law and procedure. It was that the vehicle belonged to the First Respondent in terms of the law, It having been forfeited to the Respondent.

This attitude of the Respondents that the vehicle ought not to be released to the Applicant, it having been lawfully detained persists even in responses to paragraph 7 and 8 of the Applicant's affidavit. The paragraphs read as follows :

I wish to inform the Court that I have purchased this motor vehicle from one L. H. MANYIKE of Cape Town in whose names it is registered as appears from registration documents and change of ownership form hereto annexed and marked "A" and "B" respectively.

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I had not yet effected formal change of ownership in as much as the motor vehicle was seized as shown above within two weeks of my payment of final instalment of the purchase price thereof."

This is merely denied by the Respondent who refer to their previous answers to paragraph 6 and 7 of the Applicant's founding affidavit. This was extremely unhelpful. One would have expected that the above quoted paragraphs would have been met by the credible information which the Respondents threatened that they had in their possession. But that was not to be. For that matter it might have even been that the statements are paragraphs 7 and 8 of the Applicant's affidavit were untrue on a balance of probabilities. But, now, without the slightest indication as to what the credible information would be how was this Court expected to disbelieve the Applicant? It is too

clear therefore that the basis upon which this Court was being asked to believe that prosecution was still intended, or alternatively that the Respondents were bona fide in their continued detention of the vehicle, was hollow and unrealistic.

The other answer by the Respondents was that the Applicant was still expected by Respondents to bring his friends from Soweto, only after that would necessary steps be taken. There are three questions to this. The first one is whether the Applicant bore the onus of proving that he was entitled to possess the vehicle when the vehicle was already detained and prosecution intended? The second one is whether the Respondents were honest and bona fide in expecting the Applicant, still, to come up and bring his friends from Soweto? Thirdly once the Respondents had decided and did forfeit the vehicle to themselves would it be an honestly held expectation that the Applicant was still to bring forward his friends from Soweto? Did the Respondents genuinely expect the Applicant to prove that he was lawfully entitled to possess the vehicle, which the First Respondent now called his own, by reason of the alleged forfeiture? I took the view that the Respondents' attitude was a bit impertinent.

One of the replies to paragraph 9 was very

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interesting. It was to the effect that the Applicant had no locus standi to sue in respect of the vehicle inasmuch as he had clearly stated that the vehicle did not belong to him. Furthermore that his right of lien had since been vitiated by the fact that the vehicle was suspected to be stolen thus entitling the police to seize it. I have already stated that I would in the absence of credible information to the contrary, conclude that the Applicant was entitled to possess the vehicle. He was therefore a bona fide possessor. "That being so he was, at the time of taking the car from him by the police a bona fide possessor thereof. He would as such have an interest and right in respect of this car, he need not need to establish ownership in order to have necessary locus standi for claiming the relief sought by him." IKANENG MAKAKOLE vs THE OFFICER COMMANDING & ANO. C OF A (CIV) NO.18/85 per Miller JA at page 3. I do not think the Counsel for the Respondents rightly appreciated the significance of the fact that the vehicle has been obtained from possession of the Applicant who had a title in law to if based on that possession. It need not have been ownership strictly speaking.

The value of my speech so far, if for anything else, has been to show the Respondents' unwholesome attitude towards the real purpose of the detention of vehicles.

That they saw no need and had no willingness to prosecute the Applicant. Furthermore the lackadaisical nature of the investigation (if there was any investigation at all) of the suspectedly stolen vehicle has been demonstrated by the conduct of the Respondents themselves.

The Applicant deposed to that on or about the 24th September 1994 he saw the vehicle being unlawfully used by the officers of the First Respondent stationed at the Police Headquarters, to convey what appeared to be household property from Maseru and taking the direction of Mohale's Hoek. Furthermore that the vehicle was bearing a false government registration number X1078. Ever since the mentioned date, the officers of the First Respondent were continuously using the motor vehicle under different false government registration numbers apparently with a view to disguising the vehicle. The Applicant felt, as he opined, that the Respondent would have no right in law to use the vehicle in the manner described or at all, the use being prejudicial and therefore calling for an urgent seeking of the Order sought in the application. To this the only denial and admission that is issuable is the one contained in paragraph 10 of the answering affidavit of Monyobi which is that :

Ad paragraph 10 thereof

> It is denied that the use of different number is intended in any manner whatsoever to disguise the vehicle's identity. As stated above the vehicle has now been lawfully forfeited to the State and there would therefore be no point in disguising its identity at all." (my underlining)

I did not understand nor could I accept that it would have been lawful for the Respondents to have forfeited the vehicle without notice to the Applicant. The reason is that he was a *bona fide* possessor. There was therefore a need to give him notice. This is besides whether the reason for forfeiting the seized property was a good or bad one. "The Police Officials who are in possession of seized articles deal with them according to circumstances ..... If no person may lawfully possess the article or the police official concerned does not know of any person who may lawfully possess it, the article is forfeited to the State." See the Law of South Africa Vol. 5 (W A JOUBERT) 2nd Edition part 2 paragraph 185 page 134. See also the immensely helpful judgment in DATNISS MOTORS (MIDLANDS) PTY LTD vs MINISTER OF LAW AND ORDER 1988(1) SA 503(N) on the interpretation of section 20 of Criminal Procedure Act 51 of 1977 or disposal by police of goods suspectedly stolen.

The Datniss Motors Case has guided me to conclude that if no prosecution (as in the instant matter) is instituted the object seized has to be returned to the person from whom it has been seized, unless that person's possession of the object would be unlawful. The onus is on the State to show on the balance of probabilities that the person from whom the object had been seized may not legally possess it and is therefore not entitled to its return. (See also DOOKIE vs MINISTER OF LAW AND ORDER 1991(2) SALR 153(D).

After giving proper consideration, due weight and attention to the factors bearing on the seizure of the vehicle in question I became satisfied that forfeiture of the vehicle could not be reconciled with requirements of section 53(2) of the Criminal Procedure and Evidence Act of 1981 in that :

(a) the Applicant is the person who would "lawfully possess the article" and

(b) the policeman concerned knew of the person who would "lawfully possess such article."

The problem of the proper person to possess the vehicle was made light and easy by the demonstrated unwillingness by

the police to investigate the matter adequately. I did not have a problem in declaring the Applicant to have been the person who could lawfully possess the vehicle. The Crown was not entitled to forfeit the vehicle. The forfeiture was unlawful.

The Counsel for the Crown did not attach importance to the need for there to have been a notice to the Applicant and for an order of forfeiture by the Clerk of Court or Registrar of High Court. Such an order of Court (showing the date on which it was made) should have been produced. Its absence was amply demonstrated by the fact that the date of forfeiture of the vehicle was not even stated.

I had no hesitation in granting prayers (a) (b) and (c) of the Applicant's notice of motion, thereby allowing the application.

T. MONAPATHI
JUDGE

21st August, 1995

For the Applicant : Adv. S. Phafane

For the Respondents : Adv. M. Mapetla