CIV/APN/390/93

IN THE HIGH COURT OF LESOTHO

In the matter between:

TLALI LEFETA	APPLICANT
V	
KOSE J. MAFEREKA	1ST RESPONDENT
ELIAS MOKHOSI	2ND RESPONDENT
OFFICER COMMANDING ROBBERY & CAR THEFT SQUAD	3RD RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu, on the 23rd day of January, 1995.

On the 13th September, 1993 Mr. Nathane for Applicant brought before Molai J. an urgent application (on a certificate of urgency) asking for an order in the following terms:

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"1. That a rule nisi do hereby issue calling upon the Respondents to show cause,if any, on a date to be determined by this Honourable Court why:-

(a) In the event Third Respondent deciding that there is no justification on holding the 1989 Model Toyota Hiace with chassis and engine numbers YH63V9005607 and 4Y9035328 respectively presently bearing registration numbers OG14799, the deputy-sheriff shall not be directed to seize and keep the same in safe custody pending the finalization of this application;

(b) The vehicle described above shall not be released forthwith to Applicant herein;

(c) First and Second Respondents shall not

be directed to pay the costs herein;

(d) Granting Applicant such further and/or alternative relief as this Honourable Court may deem fit.

2. That rule 1(a) operates with immediate effect as a temporary interdict."

The *Rule Nisi* was granted as prayed and the return day was to be the 27th September 1993. The *Rule Nisi* was extended to the 18th October 1993 when the *Rule Nisi* was made absolute by default. There had been a Notice of Intention to Oppose the application by First Respondent, but the attorney of the day had failed to file opposing papers timeously. In the event an application for rescission of judgment was made.

This application for rescission of judgment was for one reason or the other not heard until the 26th January 1994. It was finalised along with CIV/APN/510/93 which was meant to protect the vehicle from deterioration. When

the rescission judgment was granted the Court ordered the Applicant to return the vehicle to the Deputy Sheriff pending the finalisation of this application. A written judgment deals with the details of the rescission.

The matter was of the type that in my view called for the full ventilation of the grievance of the Applicant, so that the nature of both Applicant and First Respondent's right could be clarified. The result that when argument began on the 12th July, 1994 I made the following order:-

> "The matter is referred to *viva voce* evidence on the circumstances surrounding the Lesotho registration. The evidence is heard without in any way deciding the rights of the *bona fide* possessor."

The matter was then postponed to the 26th July, 1994 and costs of the day were awarded to First Respondent.

Viva Voce evidence was heard on 26th and 27th July, 1994. The matter was adjourned to the 5th August, 1994. After this date several postponements followed until the matter was again heard on the 28th November, 1994. The

matter was again heard on the 10th January, 1995. I asked for the originals of the documents that were annexed although they had been admitted by consent. In giving *viva voce* evidence the parties were allowed a liberty that went beyond the Court Order. As none of the parties objected, considerable latitude was given to both parties.

Despite the initial denials of Elias Mokhosi the Second Respondent (in the affidavit he made in support of First Respondent) it is common cause that Elias Mokhosi bought the vehicle in question for Applicant. To put it in Applicant's own words, Applicant bought this vehicle by a suspensive sale agreement (almost identical to a hire-purchase sale) through Elias Mokhosi the Second Respondent. Although Elias Mokhosi is the Second Respondent he has not opposed this application because he no more has any interest in the vehicle, because he has since sold this vehicle to First Respondent. For that reason I shall refer to him in this application as E.T. Mokhosi.

It is common cause that this vehicle was bought from Kempster Ford Durban in the Republic of South Africa.

Applicant has annexed as "TL2" the Registration certificate in the names of T.E. Mokhosi in respect of that vehicle. According to "TL2" the registration number of the vehicle is OG 14799. Its Chassis Number is YH63V9005607, Engine Number 4Y9035328. This vehicle registration certificate is according to "TL2" dated 18/01/1991 and is valid up to 31/12/91.

While it is true that T.E. Mokhosi used his credit facilities to obtain the vehicle for Applicant, it seems to be common cause that the vehicle was being bought virtually through hire-purchase. This means that if Applicant did not pay for it regularly, the financing company would repossess it. It is also clear that both parties knew T.E. Mokhosi was not supposed to part with possession until the vehicle had been fully paid for. Yet by private agreement between Applicant and T.E. Mokhosi, T.E. Mokhosi was only a front, the real purchaser was Applicant. Therefore the vehicle was taken by Applicant who lives in Lesotho. That being the case the vehicle was from the very beginning in Applicant's possession. So long as Applicant paid regularly there would be no problem. If, however, Applicant failed to pay regularly,

the financing company had a right to repossess the vehicle. In that event, T.E. Mokhosi would be in trouble because the vehicle would no be in his possession when the finance company came to repossess it.

It is common cause that Applicant was to pay into T.E. Mokhosi's account number FKG027668B with Wesbank monthly instalments for the vehicle.

The suspensive Sale Agreement which T.E. Mokhosi has annexed to his affidavit marked "TEM1" shows the following:

Selling Price	R46950.00
Additions	6230.85
Total Purchase Price	R53180.85
Initial Payment	0.00
Trade In	0.00

I found this surprising because it is common cause that Applicant traded in his cressida sedan car and it was taken for the sum of R16000.00. If that trade-in had been deducted the principal debt would have been R37180.85.

Because the M16000.00 trade-in was not deducted the principal debt remained R53180.85 to this was added finance charges of R26111-15 and Doc Fees of M52.00. The result of this was that the total debt Applicant had to pay was R79344.00. This sum was to be paid over 34 months in instalments of R2204.00 per month beginning from the 28th June, 1990. The final instalment was to be paid on 27 June, 1993.

In the founding affidavit of this application, Applicant does not speak of this M16000.00 trade-in of his sedan cressida car, nor does he describe how the vehicle in question was bought. First Respondent in his Answering Affidavit speaks of T.E. Mokhosi's loan of M86000.00 mentioned before the police Maseru which he alleged was raised to finance the purchase of the vehicle. Despite what T.E. Mokhosi said the suspensive sale agreement "TEM1" discloses the indebtedness of M79344.00 not M86000.00.

Applicant in his Founding Affidavit does not say anything about monthly instalments save stating he had continued paying instalments regularly until T.E. Mokhosi

seized the vehicle from Applicant's employees in June 1992. T.E Mokhosi in the affidavit supporting First Respondent says in February 1992 he discovered Applicant was in arrears with his and payments and that Applicant had not paid for some months. T.E. Mokhosi (like Applicant) does not say what the monthly instalments were. T.E. Mokhosi says the bank wrote him a letter showing he was in arrears in respect of that vehicle, but this letter was never made available to the Court in these proceedings. All what he has brought before this court is annexure "TEM4". This a Future Bank statement of Account which begins on the 27th March, 1992.

Clarity on this issue of instalments and the trade-in of Applicant's vehicle from which the down payment of M16000.00 was realised appears in T.E. Mokhosi's Affidavit dated 11th November, 1993. This affidavit was made in support of an application for rescission of judgment. Consequently in it, Kose J. Mafereka (First Respondent) is referred to as Applicant while the present Applicant in that Affidavit is referred to as the Respondent. At paragraph 3, T.E. Mokhosi said:-

"Sometime on the 28th June 1990, I and the Respondent reached an agreement that I should enter into a contract with Future Bank (also known as First National Bank) in my name for the purchase of a red combi, and the Respondent should make a down payment of M16000.00 deposit for the same and thereafter pay monthly instalments of M3100-00 for 36 months. The total amount thereof being M86000.00. The necessary documents would have to be delivered to Respondent after all payments have been made to First National Bank".

This information should have been in Applicant's Affidavits. It is neither in his Founding nor Replying Affidavits. When T.E. Mokhosi made his affidavit in support of the main Application on 15th February, 1994 he no more disclosed this information. Nevertheless both at the rescission of judgment stage and when this main Application was argued is common cause that Applicant made a down payment of M16000.00 and the monthly instalments that were agreed by the parties were M3100.00.

I have already shown that annexure "TEM1" reveals that the down payment of M16000.00 does not appear in the suspensive sale agreement and that the total debt was to be M79334.00 and the instalments M2204.00. Yet at paragraph 6 of the affidavit in support of First Respondent's application for rescission, T.E. Mokhosi says:-

> "In June 1990 the Respondent (meaning applicant) then traded in his other vehicle for M16000.00 and I paid same into the account number referred to..."

Giving *viva voce* evidence before me T.E. Mokhosi said the vehicle that was being bought for Applicant was M46000.00 as it stood and Applicant traded in his cressida for M16000.00 and SABTA took the M16000.00. He does not know why SABTA took M16000.00. The deposit asked for was M10000.00. At the time they went to the bank they owed the garage about M30000.00. T.E. Mokhosi said he borrowed the money from the bank. He was asked Applicant if he would be able to pay M3100.00 per month, Applicant said he would be able to pay it. T.E. Mokhosi told Applicant he

would have asked for a longer repayment period. He then signed for the vehicle including an insurance contract. They then went to pick the vehicle at the garage.

What emerges above is that T.E. Mokhosi cannot be (in detail correct) about what really transpired between him, the garage and the bank. He is telling the truth about what he communicated to the Applicant and what Applicant undertook to pay. He certainly cannot be telling the truth about what happened to the Applicant's M16000.00 trade-in money which was the initial payment. That is a matter which cannot be resolved in this application.

We have to bear in mind that T.E. Mokhosi though an astute businessman and quite smart, is not well educated. In fact (when you add liability under the suspensive Sale Agreement "TEM1" and the insurance plus bank charges as more fully appears in "TEM2") the total debt was R89351.72. His estimate of R86000.00 is over R3000.00 wrong. Consequently the monthly insurance premiums including monthly instalments for the vehicle amount to a total of R3038.81. Therefore the monthly instalments of M3100.00 is understandable. The fact that M3100 per month

was to be paid is confirmed by applicant himself in re-examination at the time he was giving *viva voce* evidence.

The real basis of Applicant's grievance is that at the time T.E. Mokhosi seized the vehicle he was up to date with his payments therefore the bank could not have had any complaint. This was what *viva voce* evidence sought to address although it had not been specifically called for that purpose. I therefore let the parties ventilate this aspect as it was Applicant's real complaint.

According to Applicant this vehicle, which was used as a taxi, used to carry passengers from Van Rooyen's border post to Durban. This business was carried on for more than six months without any problems. The numbers of the vehicle which were once CE had been changed to OG 14799 a Ficksburg registration number. One day more than six months after he had been working on the Van Rooyen border post to Durban, the Ficksburg taxi drivers refused to allow him to load passengers. The reason for this was that he was operating a taxi in the Republic of South Africa although he is a Lesotho citizen.

While T.E. Mokhosi was there there had been no major problems. Unfortunately T.E. Mokhosi was injured and hospitalised. He was out of circulation for several months. The vehicle was still registered in T.E. Mokhosi's names at Ficksburg in the Republic of South Africa. During T.E. Mokhosi's absence Applicant's business was effectively stopped because if he loaded passengers, those Ficksburg taxi owners would force him to unload the passengers. The vehicle could not more operate as a taxi in the Republic of South Africa.

In paragraph 4·2 of his Founding Affidavit Applicant says his problems were caused by the fact that his permit could not be renewed in the Republic of South Africa. This is not quite the same as the allegation that the Ficksburg taxi owners just decided to stop him loading passengers.

I went through Applicant's receipts evidencing payment to the Wesbank. He had handed in 14 receipts beginning from July 1990. The amount paid came to R44800.00. He claimed some of his receipts were lost. Among my papers I found a rather illegible schedule of

payments. It showed 20 payments which included the 14 receipts that Applicant had handed in. These 20 payments amounted the total M60800.00. There were reverse payments amount to the total sum of M3500.00. That being the case the amount that the Wesbank/Future Bank received from Applicant between July 1990 and June 1992 is M57300.00.

I noted further that, from that August 1991 payments of Applicant became irregular. By the end of May 1992 Applicant ought to have paid the sum of M71300. This means that when T.E. Mokhosi seized the vehicle Applicant was a little over four months in arrears with his instalments. If we include interest on arrears we might find that Applicant was at least five months in arrears in terms of the Suspensive Sale Agreement annexure "TEM1", read with the insurance annual debit shown on annexure "TEM2". Although Applicant would have us believe he lost more receipts than the six that have been shown on the rather illegible Wesbank Future Bank schedule that I referred to, I do not believe Applicant on this point. In any event the Court has to base itself on some evidence not a memory that could well be faulty.

I have already said T.E. Mokhosi has not given a satisfactory explanation about what happened to the Applicant's trade-in of M16000.00 that ought to have been part of the purchase price. Giving *viva voce* evidence he says it must have been taken up by SABTA fees. How, he does not say. He contradicts himself badly on this point. His own affidavit makes his evidenciary situation untenable.

Applicant and his wife giving *viva voce* said something about T.E. Mokhosi's membership of SABTA having something to do with the bank's extension of credit facilities. As this deposit of M16000.00 is not the core of the dispute deciding the matter one way or the other cannot affect the outcome of this application because it is common cause that applicant was supposed to pay M3100.00 per month over 36 or 34 months. I have already found he was about four months in arrears. The estimate by T.E. Mokhosi of arrears of three to four months corresponds with my calculations.

There can be no doubt that T.E. Mokhosi was not entitled to help himself to the vehicle that was in

Applicant's possession. The reason being that:

> "In the final analysis the protection of possession is part and parcel of the protection of the peace in a community which could not be maintained if every person who asserts that he has a real right to a particular thing which is in another person's possession would be entitled to resort to self-help." —Silberberg & Schoeman *The Law of Property* 2nd Ed page 135.

There is no doubt that even if Applicant had wished to follow the law, his hands were tied by the fact that the judicial process could not help him. I have a great deal of sympathy for him. The great problem that Applicant had was that the vehicle had been taken out of the court's jurisdiction by T.E. Mokhosi who is a *perigrinus* in Lesotho. In dealing with a case where a vehicle had been illegally seized and taken out of the court's jurisdiction Waddington J. in *Makoti v Brodie & Others* 1988(2) SA 569 considered not only the question of jurisdiction but that of effectiveness as well, and he said:-

> "The principle of effectiveness means that a judge has no right to pronounce a judgment if he cannot enforce it in his own territory."

That being the case, Applicant had no way of taking timeous action against T.E. Mokhosi who had spoliated him of possession of the vehicle.

When Applicant saw this vehicle in the hands of First Respondent he acted. This illicit deprivation of Applicant by T.E. Mokhosi led to an act of self-help by Applicant against First Respondent. Towards this act of self-help which follows another self-help Steyn J. in *Mans v Loxton Municipality and Another* 1948 (1) SA 966 at 978 said:

> "But if the dispossession has been completed as in this case where the spoliator, the plaintiff had completed his rescue of the sheep and placed the sheep in his lands, then the effort of recovery is, in my opinion, not done *instanter* or forthwith but is a new act of spoliation which the law condemns."

This seizure of the vehicle from First Respondent cannot even be counter-spoliation because T.E. Mokhosi had parted with possession of the vehicle.

I have already stated that Applicant could not have any colour of right to seize this vehicle in the hands of First Respondent merely because T.E. Mokhosi seized it from him illegally. Even if T.E. Mokhosi himself was in possession after the passage of one year there would have been problems. Jones and Buckle *The Civil Practice of the Magistrate Courts of South Africa* 8th Edition Volume 1 at page 104 puts the position as follows:

> "The Court has a discretion to refuse an application where, on account of the delay in bringing it, no relief of any practical value can be granted at the time of hearing of such application." See also the case of *Jivan National Housing Commission* 1977 (3) SA 890 at page 893 AB.

Nevertheless under the common law *mandament van spolie* application is normally expected to be brought within one year from the time the act of spoliation took place. See Voet 43·16·6. The reason being that this remedy is *possessorium summariissimum* intended to restore possession instantly. In *Ninaber v Stuckey* 1946 AD 1049 Greenberg JA at 1060 said:

> "Whatever the cause of the delay, there is no

> warrant for holding that the appellant thereby lost his remedy."

The present position of the law (had E.T. Mokhosi still have been in possession) would have that

> "If applicant had delayed for more than a year before bringing his application for *mandament van spolie*, there would have to be special considerations present to allow such applicant to proceed with his application." See *Jivan v National Housing Commission* (supra) at page 893 BC.

In this case, had T.E. Mokhosi been still in possession of this vehicle, it might have been possible for Applicant to make a case for a belated spoliation application because the vehicle had been taken out of the court's jurisdiction. Consequently he could not have made the spoliation application he might have wished to make. Unfortunately because T.E. Mokhosi has parted with possession, a spoliation application is not possible against T.E. Mokhosi let alone First Respondent. Therefore no relief of any practical value can be granted to Applicant at the time of hearing of this application.

T.E. Mokhosi had spoliated Applicant of possession 15 months before. Appellant had also been to the Republic of South Africa to try and recover the vehicle. Applicant had also even tried (without success) to be substituted as a purchaser in place of T.E. Mokhosi. This he did by going to Future Bank the legal owner of the vehicle by cession in terms of the Suspensive Sale Agreement. Therefore the law condemns Applicant's seizure of the vehicle from the possession of First Respondent. This is particular so because First Respondent and the police had told Applicant that he should resort to the law. What applicant did occurred:-

> " — particularly in a case where applicant against the clearest expression of respondent's prohibition, deliberately takes the law into his own hands." — *Ness & Another v Greef* 1985 (4) SA 641 at 648 FG.

The court has to evaluate the situation realistically. As Addleson J. in *Rusin Properties v Ferreira* 1982 (1) 658 at page 670 G has said

> "The essence of the remedy by way of spoliation is a robust one. Discretion and considerations of convenience do not enter into it."

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By this I understand that its sole purpose is to put the process of the rule of law back on its rails after the derailment of self-help. Other legitimate remedies can then be followed to vindicate the rights of the spoliator. Applicant had no right to take away this vehicle from First Respondent who was an innocent third party.

In the Republic of South Africa the purchaser seems to enjoy 30 days grace after receiving notice of cancellation of sale and the return of the goods following his default in payments. See the *Credit agreements Act 75* of 1980. During this period the credit receiver who is in default can rectify his default. T.E. Mokhosi was entitled to this. Whether he received the notice of this kind, he has not shown any written proof of it. He only alleges such notice was given. Under pressure from Future Bank he illicitly seized the vehicle that was in Applicant's possession.

What has to be determined is whether T.E. Mokhosi's spoliation can be equated to theft.

The answer is by no means easy. In *Bank Van Die*

Oranje Vrystaat v Rossow 1984 (2) SA 644 a leased vehicle had been taken to a garage for repairs. The lessee was several months in arrears of payment in terms of the lease. The lessor took the vehicle from the garage which still had a lien over it. As soon as the vehicle got into the lessor's possession, the lessor sold it to a third party. The lessee (in a counter-claim against the lessor who was claiming arrear instalments) applied for a stay of action pending the restoration of the vehicle because spoliation had occurred. The Court held that there was no spoliation because for spoliation to take place, the person who is sued must have been in possession of the *res*. Furthermore as the vehicle has been sold by the lessor in good faith to a third party a spoliation order would not be competent. The case of *Bank Van Die Oranje Vrystaat v Roussow* differs from this case because Applicant says T.E. Mokhosi did not sell the vehicle in question in good faith.

Spoliation is certainly not theft. It is merely self-help that is embarked upon under colour of some right. There is no dishonesty in this seizure of property from the complainant's possession. The complainant is

entitled to get that property back through the summary remedy of *mandament van spolie*. In this case T.E. Mokhosi illicitly decided to protect his interests through the illegal seizure of the motor vehicle that was in Applicant's possession.

The question of whether a theft had committed theft revolves on who the complainant is and whose property the vehicle in question was. In *S v Van Heerden* 1984 (1) SA 666 the facts were as follows, the Appellant had sold the tractor which he had bought on hire-purchase to a third party. When Appellant did this he still owed payments on the purchase price and ownership in terms of the contract still vested in the original seller. Appellant did not even notify the seller of this sale of the tractor to the third party. The Appellate Division held this was an unlawful dealing in terms of the hire-purchase agreement. The reason being that Appellant was entitled to a right of possession and enjoyment of the tractor until such a time as he had paid the full purchase price. The Appellant was therefore in *S v Van Heerden* guilty of theft.

In this case the vehicle in question has been fully

paid for and the original seller the Wesbank or its cessionary the Future Bank is not the complainant. The goods so to speak now belong to T.E. Mokhosi. They could belong to him at any time provided he paid off the sellers by paying the full price. This suspensive sale agreement is in that respect identical with a hire-purchase agreement. Theft is a crime of dishonesty. Selling what is your property regardless of how possession was obtained cannot be theft.

In this case apart from the illegality of spoliation there is no *falsitas*. T.E. Mokhosi was prepared to let applicant pay all his expenses and pay off the Future Bank and take the vehicle in March 1993. Unfortunately applicant could not find the money. Three months later T.E. Mokhosi sold the vehicle to Third Respondent and paid off Future Bank. Annexure TEM4 shows that on the 6th July 1993 T.E. Mokhosi paid R20000.00 to Future Bank and by the 16th July 1993 he had fully paid for the vehicle in terms of the suspensive sale agreement which he had signed with the Wesbank that later ceded the rights over the vehicle and the debt to Future Bank. All this is above board, no dishonesty can be inferred.

Contracts of sale with a *pactum reservati dominii* have been recognised in our law long before *Hire Purchase Acts* were enacted.—See *Quirk Trustees v Assignee of Liddel & Co.* (1885) 3 SC 322 in which basing himself *Vazi Booy v Short* 2 Buch EDC 301 De Villiers CJ was dealing with property that had been sold with the condition that ownership shall only pass to the purchaser upon payment of the last of several notes, payable at different dates. At page 329 De Villiers CJ said:

> "In my opinion the condition meant no more than that there should be no sale until the last instalment had been paid. This condition has admittedly not been performed by the purchaser, and the result is that ownership of the goods has not been vested in the plaintiff....."

De Villiers CJ came to this decision "for the simple reason that there was no sale until payment of the price, in other words, the condition was a suspensive and not a resolutive one".

Diemont, Marais & Aronstam *The Law of Hire Purchase in South Africa* 4th Ed. at pages 16 to 19 find the use of the word "condition" as causing confusion. They prefer

the reservation of the passing of ownership to called a "suspensive term". In my view contracts of sale of this kind have become part of mercantile law, the reservation of the passing of ownership being a guarantee or form of security that the seller will be paid. The authority of *Quirk Trustee v Assignee Liddel Co.* cannot for practical reasons be challenged in our day. The fact that the *Hire Purchase Act* does not govern this transaction makes not real difference.

It seems to me that this case revolves around the agreement between Applicant and T.E. Mokhosi. The Court of Appeal of Lesotho was once faced with a case in which a man in Lesotho bought a motor vehicle through a man in Botswana. The reason being that the man in Botswana enjoyed hire-purchase credit facilities that were not available in Lesotho. The vehicle, although registered in Botswana was by agreement taken to Lesotho because all the money that was paying for it belonged to the man in Lesotho. The Botswana man (in whose name the vehicle was purchased and registered) brought an urgent application claiming possession of the vehicle from the man in Lesotho. The monthly instalments had been paid regularly

by the man in Lesotho and there were no arrears. In the case of *Seth Lieta v Semakale Lieta* C of A (CIV) No. 5 of 1987 (unreported) the Court of Appeal held that the man in Lesotho was entitled to retain possession.

In this case I have already found as a fact that Applicant contrary to his agreement with T.E. Mokhosi was in arrears with his instalments. While the vehicle was registered in T.E. Mokhosi's name and operating in the Republic of South Africa, T.E. Mokhosi could have had relatively easy access to it. According to Applicant his wife T.E. Mokhosi had quarrelled with them and the vehicle was now registered in Lesotho in the names of Applicant. This (according to Applicant and his wife) had been authorised by T.E. Mokhosi to facilitate the payment of instalments because Applicant could not more do business in the Republic of South Africa because Ficksburg Taxi Owners forcibly stopped him from doing so. In paragraph 4·2 of his affidavit Applicant puts what happened differently as follows:-

> "I used to operate the said vehicle as a taxi between Wepener and Durban. When my permit was

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not renewed in the Republic of South Africa I decided to take my vehicle and subsequently registered it in Lesotho at Mafeteng as E.1996. Second Respondent knew this very well and raised no objections. I had bought the said vehicle through Second Respondent herein. I continued to pay instalments through him."

By Second Respondent, Applicant means T.E. Mokhosi. Contrary to what Applicant later said in court (when he gave *viva voce* evidence) Applicant here says he just registered the vehicle in Lesotho. He does not say T.E. Mokhosi authorised this registration in any way. He merely says T.E. Mokhosi "knew this very well and raised no objections". What Applicant says in this paragraph 4·2 is consistent with T.E. Mokhosi's denial that he ever signed a document transferring the vehicle to applicant or in any way authorised the registration of the vehicle in Applicant's name in Lesotho.

Which ever way I look at the evidence it seems clear that Applicant was in breach of his agreement with T.E. Mokhosi. What is only deplorable in T.E. Mokhosi's

conduct is the illegal seizure of the vehicle. The fact that T.E. Mokhosi's own assets were at risk because of Applicant's default with payment of instalments was not an excuse. Although T.E. Mokhosi is not aware of this, the fact that the vehicle was now registered in Applicant's names might have led to his prosecution for theft, a calamity he would have been obliged to avoid. Naturally, Applicant is not able to see the whole problem from T.E. Mokhosi's perspective.

It seems to me that the following words of Bristowe J in *Burnham v Newmeyer* 1917 TPD 630 at 633 should serve as a guide:

> "If the cattle have in fact been alienated to an innocent third party without the intention to defeat the proceedings (for it was done without the knowledge that these proceedings were being commenced), it is difficult to see how a spoliation order can be granted, any more than an interdict can be, because there is nothing upon which they can operate."

By June 1993 T.E. Mokhosi probably no more expected Applicant to claim the vehicle when he sold it Third Respondent to pay off the debt. All attempts by Applicant

to get the vehicle back had failed in March 1993. Therefore T.E. Mokhosi sold the said vehicle to First Respondent. By this time the vehicle had a new engine. There can be no doubt that First Respondent was an innocent *bona fide* purchaser. Therefore the potential right to bring spoliation proceedings had been overtaken by events, and was no more available to Applicant. Although this spoliation had become a matter of history, Applicant remained with the right of action against T.E. Mokhosi to claim damages or whatever he considered as being his due. But not this vehicle.

I have already said ownership never passed to Applicant., The potential owner was always T.E. Mokhosi. Had applicant fulfilled the agreement between him and T.E. Mokhosi, T.E. Mokhosi would have been obliged to pass on to Applicant the ownership that he would have had after the vehicle had been fully paid off. A failure by Applicant to keep the instalment payments up to date led to T.E. Mokhosi's repudiation of the agreement between him and Applicant by conduct. T.E. Mokhosi paid the final amounts owing by selling the vehicle in question to First Respondent. Therefore First Respondent is a *bona fide*

purchaser.

The problems of Applicant do not end there. It seems to me that even if he had a better right than he has, the problem is that he is not free from the accusation of acting negligently in putting himself in the hands of T.E. Mokhosi. To quote from Steyn JA in *Grosvenor Motors Potchefstroom Ltd. v Douglas* 1956 (3) SA 427 at page 427G:

> "Before *culpa* can be imputed to the respondent, it must be shown that, as a reasonable prudent person, he should have forseen such eventualities and guarded against them, in order to avoid a possible abuse, in the circumstances which would then arise, of the note he had handed to Kriel."

Applying these words to this case Applicant was negligent in taking the risk of buying a vehicle in T.E. Mokhosi's name and making T.E. Mokhosi the potential owner on payment of the balance owing in respect of the vehicle. Now that T.E. Mokhosi has paid fully for the vehicle by selling the said vehicle to first Respondent, Applicant is estopped from challenging this sale. Applicant was always aware that (on payment of the balance owing) T.E. Mokhosi as the registered owner of the vehicle, could as owner

pass a flawless title to any third party of his choice. Applicant cannot proceed against any *bona fide* purchaser to whom T.E. Mokhosi could sell the vehicle.

Although Mr. Nathane for Applicant said there was no actual transfer of ownership of the vehicle, the *viva voce* evidence and agreement dated 28th June, 1993 leaves me in no doubt that T.E. Mokhosi had sold the vehicle to first Respondent and that the South African police had cleared the said motor vehicle for registration in favour of First Respondent on 8th September, 1993. If T.E. Mokhosi and First Respondent say the vehicle was fully paid for, that should be enough. By the 16th September, 1994 T. E. Mokhosi had fully paid for the vehicle. Annexure "T.E.M.4" shows the last payment was made on 16th July, 1994.

On the face of the agreement of sale dated 28th June, 1993 the vehicle was supposed to be handed to Applicant as *soon as the amount of M20000-00 had been paid.* T.E. Mokhosi and First Respondent say the vehicle was to be used by T.E. Mokhosi to raise the balance of M15000.00 within three months. That portion of the evidence strikes

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me as false because of what the agreement said. Even if First Respondent and T.E. Mokhosi are not truthful on this point, this cannot affect the outcome of this application. Mr. Nathane argued strenuously that since on 28th June, 1993 the debt of Future Bank was not fully paid, the agreement of sale was void. Future Bank was not the complainant, I find this submission unhelpful in these proceedings. The reason being that (in any event the vehicle might have been handed to First Respondent after the 16th July, 1993 by which time the vehicle had been fully paid.

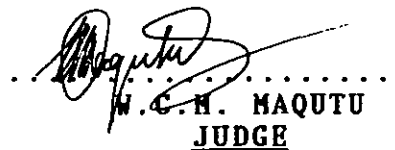
I remain with a feeling that the destination of Applicant's M16000.00 in respect of the trade-in of his vehicle has not been satisfactorily explained. This amount was supposed to be the deposit for the vehicle in dispute. But it is not properly unaccounted for. If that amount had been included in the debt, Applicant would not have been in arrears when T.E. Mokhosi seized the vehicle. This is a matter I cannot settle on the evidence before me. If there has been fraud other proceedings are called for after a proper investigation. This court could not go into this. Whatever may be the merits of Applicant's

case, he cannot have this vehicle from First Respondent who is a *bona fide* purchaser.

The Orders I make are the following:

(a) The vehicle in dispute is to be handed to First Respondent.

(b) I dismiss Applicant's application and discharge the *Rule Nisi* with costs.



M.C.H. MAQUTU
JUDGE

For Applicant : Mr. H. *Nathane*
For 1st Respondent : Mr. M. *Mathafeng*