CIV/APN/58/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

EASTERBROOK TRANSPORT (PTY) LTD	APPELLANT
AND	
THE COMMISSIONER OF POLICE	1ST RESPONDENT
ATTORNEY GENERAL	2ND RESPONDENT

REASONS FOR RULING

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 3rd of March, 1995.

A ruling was given on this urgent application on the 28th February, 1995. I considered the application premature having regard to the circumstances of the case. Consequently I postponed the matter to the 17th March, 1995 and extended the

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rule nisi accordingly. I also required the police in the meantime to speed up their investigations in order that their position at the trial might be assessed regarding the vehicles. At the end of ten days, if they did not release the vehicles, they should give reasons.

These are my reasons for ruling.

On the 16th February, 1995 Applicant brought an *ex parte* application for a *Rule Nisi* calling upon Respondents to show cause why an order should not be made in the following terms:

1·1 That First Respondent be and is hereby ordered forthwith to restore possession to Applicant or its attorney the following vehicles:

A. One International S Line Mechanical Horse Registration Number YBX 34267.

B. A trailer Registration Number KNE 9655.

C. A Freightliner Mechanical Horse Registration Number YBX 24756.

D. A Trailer Registration Number 457175
Three empty containers 2 six metres 1 twelve metre.

1·2 That First Respondent be ordered to pay the costs of this application.

1·3 That further or alternative relief as the above Honourable Court deems fit be granted.

2. That the provisions of paragraph 1·1 shall operate as an interim order, with immediate effect pending the finalisation of this application.

The *Rule Nisi* was granted as prayed. Applicants served the Police and demanded the release of the vehicles forthwith. The police demurred and got the prayer 2 of *Rule Nisi* rescinded. Consequently Applicant's vehicles were no more to be released forthwith.

Before going into the merits of the application itself, I have to comment upon the tendency to abuse the Court procedure that has been displayed by Applicant and others. *Ex parte*

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applications are not meant to obtain relief to the prejudice of the other side without the other side being heard. The *audi alteram partem* rule is a fundamental precept in all countries with the Rule of Law.

Legal practitioners should not take advantage of the fact that courts are over-worked and put too much trust in legal practitioners that appear before them. Courts have to put their trust in legal practitioners because they are officers of the Court. Rule 8(22)(c) of the *High Court Rules* 1980 dealing with all urgent applications including *ex parte* ones is evidence that legal practitioners share the responsibility with the judge in the granting of urgent interim relief by stating:-

> "Every urgent application must be accompanied by a certificate of an advocate or attorney which sets out that he considered the matter and that he *bona fide* believes it to be a matter for urgent relief."

It is therefore understandable that Courts (relying on legal practitioners who appear before them) sometimes do not scrutinise the interim orders that practitioners seek as thoroughly as they ought to. It is therefore not surprising that once it was brought to the attention of the Court by the Respondents that the

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Order that had been granted *ex parte* was irregular having regard to the circumstances of the case, the Court cancelled it.

When Applicant brought an application for contempt of Court, Applicant found the order was cancelled without notice to Applicant. The Court was entitled to do this because of the nature of the prejudicial *ex parte* order it had made without hearing the other side. In so doing the Court relied on Section 59 of the High Court Rules 1980 which provides:-

> "Notwithstanding anything contained in these Rules the court shall always have the discretion, if it considers it to be in the interests of justice, to condone any proceedings in which provisions of these rules are not followed."

What the Court did was to level the playing fields so that the parties can be evenly matched. Applicant got an *ex parte* order to the prejudice of Respondents and by the same token *ex parte* Respondents had it rescinded. The Court rescinded that *ex parte* order because it was contrary to the spirit of the Rules and everything that the courts stand for.

Legal practitioners have time and time again been warned that they should not get orders which might prejudice the other

side *ex parte*. Indeed in *Connie Mokete v Simon Mokete* CIV/APN/487/93 (unreported), this Court said an urgent application does not have to be brought *ex parte*. the other party in the other application could still be served, but the periods of notice and *dies induciae* shortened so that the matter can be heard within a short time. An interim order is only to be obtained *ex parte* if giving notice might defeat the purpose of the application. In this case nothing might happen to the Applicant's vehicles if the police were given notice.

The view I take after reading the papers is that Applicant legitimately felt the matter was urgent. Nevertheless in view of the interim order that Applicant was seeking, Respondents ought to have been served with the notice of application. The reason being that the order sought was to the prejudice of the Respondents. I am fortified in my view by the remarks of Beck J. in *Republic Motors v Lytton Road Service Station* 1971(2) SA 516 at 518 F-H where he said:

> "The procedure of approaching the court *ex parte* for relief that affects the rights of other persons is one which, in my opinion, is somewhat lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been

> heard and it is, to that extent a negation of a fundamental precept of *audi alteram partem*. It is accordingly a procedure that should be sparingly employed and carefully disciplined by the existence of factors of such urgency, or well-grounded apprehension of perverse conduct on the part of the respondent who if informed before-hand...the course of justice is in danger of frustration unless temporary curial intervention can be unilaterally obtained."

This caveat together with safe-guards that Beck J. recommended against the adverse effects of *ex parte* application was approved by Lehohla AJ (as he then was) in the case of *L. Khoboko v N. Khoboko and 2 Others* CIV/APN/402/86 (unreported).

I need only add that in this case had the vehicles been released to Applicant, to be taken outside the jurisdiction of this Court, the consequences of the Order might have had a final effect although phrased in an interlocutory manner. I am therefore not happy with the manner in which Applicant's attorney phrased that prayer and lost sight of the co-responsibility he shares with the Court in urgent applications. I associate myself with the complaint that Coetzee J made against the strain *ex parte* applications put on the courts. Coetzee J complaining about the way legal practitioners carry on said:

> "These practitioners feel at large to select any day

> of the week and any time of the day (or night) to demand a hearing. This is quite intolerable...." Vide *Luna Meubel Versaardigers v Markin & Another* 1977(4) SA 135 at 136.

Nevertheless Courts are obliged to help citizens, but they should not be alone in this. Coetzee J then continued:

> "Therefore, practitioners should carefully analyse the facts of each case to determine,...whether a greater or less degree of relaxation of the Rules and of the ordinary practice of the court is required." *Luna Meubel Versaardigers v Markin & Another* (supra) at 137F.

I note there are no allegations in Applicant's founding affidavit justifying the relaxation of "the ordinary practice of the court" requiring the observance of *audi alteram partem* principle.

One of the problems that have been present in applications of this nature for some time is that of failure to distinguish between the office of Attorney-General and that of the Director of Public Prosecutions. The Attorney-General represents Government in all civil proceedings brought against Government. See the *Government Proceedings and Contract Act* of 1965. He has no function to perform in criminal prosecutions. That is the function of the Director of Public Prosecutions.

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When the police have charged a suspect and handed over their file to the Director of Public Prosecutions, their primary and custodial role which more fully appears in Sections 51 and 55 of the *Criminal Procedure and Evidence Act* of 1981 becomes secondary and supportive to the prosecution which is under the Director of Public Prosecutions. It seems to me the powers of decision on exhibits and who to bring to trial pass on to the prosecutors and the Director of Public Prosecutions. Part II of the *Criminal Procedure and Evidence Act* of 1981 makes this abundantly clear.

It seems to me that since Applicant wants the vehicles that might be used as exhibits, he ought to have joined as a party the Director of Public Prosecutions who now has the powers of decision now that Applicant's drivers have been charged with a criminal offence. On this occasion I will not make an issue of this because the Respondents did not raise this as an objection.

Applicant's deponent Dino Naidoo is a director of the Applicant company. This company has operations both in Lesotho and the Republic of South Africa.

It is not clear whether Applicant is a transnational company. In Lesotho Applicant is known as Easterbrook Transport

(Pty) Ltd. and according to Dino naidoo Applicant has an associate corporation, Easterbrook Transport CC 416 Archary Road Clairwood Durban". in the Republic of South Africa. I was advised that Applicant's deponent Dino Naidoo resides in Durban when I was asked by Applicant's attorney to admit the faxed Replying Affidavit into the record of proceedings. (This I did in view of the urgency of the matter.) At paragraph 4 of applicant's founding affidavit, it is averred:-

> "The applicant and its associate corporation Easterbrook CC carry on business of a transport operator countrywide in South Africa as well as Botswana, Swaziland and Lesotho."

On the 10th February, 1995 applicant's deponent was approached by Gugic Govender by fax received at the deponent's Durban office with a request to hire two 40' trucks and trailers with containers for a trip to Maseru for the conveyance of goods from Maseru to Durban. It is not clear where the deponent was at the time. Deponent dispatched his two drivers with the trucks, namely George P. Hogg and Senzo Maphumolo. These two were to be later arrested and charged with house-breaking and theft and now appear as accused number one and four in CR 139/95 in Maseru, Lesotho. The deponent of Applicant came to know of

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their arrest at 17 hours on the 13th February, 1995. When he got to Maseru on the 14th February, 1995 he found that

> "the drivers had been arrested by members of the police Maseru and the vehicles and their containers (hereinafter called "the vehicles") had been seized by the police." See paragraph 7 of Applicant's founding affidavit.

Applicant's deponent says they "ascertained from members of the Lesotho police that both vehicles had been seized and were being held 'as exhibits' in the case against the drivers". The view that Applicant has (advised by his attorney) is the that the vehicles could not be properly be exhibits in the case against the accused therefore the police are holding them unlawfully.

On the facts on Applicant's own affidavit I have problems with the submission of Applicant because of Section 51 of the *Criminal Procedure and Evidence Act* of 1981 which provides:-

> "On the arrest of any person on a charge of an offence specified in Part I of the First Schedule, the person making the arrest may seize the vehicle, receptacle in possession or custody of the arrested person at the time of the arrest and used in the conveyance of or containing any article or substance in connection with which offence is alleged to be or to have been committed."

Among the offences in which Schedule I Part I apply are Breaking or Entering any premises, whether under common law or a statutory provision with intent to commit an offence. Robbery. Theft whether under common law or a statutory provision. It seems Applicant's attorney in making the demands he made to the police, and giving the advice he gave to Applicant had not checked the provisions of the law on this leg of the application.

Paragraph 12 of Applicant's affidavit is suggesting spoliation because possession was through the arrested drivers "acting in the course of their employment" and the alleged forcible dispossession does not help Applicant. It merely justifies the action of the police that have seized and held the said vehicles in terms of Section 51 of the *Criminal Procedure and Evidence Act* of 1981. This section gives the police the discretion to seize such a vehicle in making an arrest in circumstances such as these.

It was precisely because of the aforegoing that I took the view that Applicant acted prematurely and ill-advisedly in rushing to court. Although I do not agree with the submission that the police can just hold this vehicle until the end of trial I am of the view so far the police have acted properly. The

police in my view have not yet finally made up their mind to use this vehicle as an exhibit, although some of them have said these vehicles will be used as exhibits.

It is a matter of great concern that the Respondents only filed their answering affidavit on the 28th February, 1995. I find this delay unacceptable and at the end of this application I will take this into account when I award costs. Respondents did not treat this matter with the expedition it called for having regard to the fact that this is an urgent application. It is for this very reason that I put the Commissioner of Police (the First Respondent) to terms when I postponed this matter.

Mr. Buys for applicant said because Applicant's deponent Dino Naidoo had not been arrested, there are no grounds to suspect Applicant is a suspect in the case whose investigation is continuing. I am not sure this is correct, the police do not have to arrest a person for us to conclude that he is a suspect.

Mr. Mohapi for the police would not commit the police on the question of whether the vehicles would be definitely used as exhibits. All he was clear about was that they are potential exhibits. No one can dispute this. In any event Applicant as

a company possesses through its servants within the scope of their employment. The two drivers on Applicant's own averments at paragraph 12 of its founding affidavit possessed the vehicles on behalf of the Applicant. Whether the vehicles will be exhibits will depend on the investigations. Similarly the fact that the two drivers are the accused does not mean they will at the end of the investigations stand trial. The Crown might drop charges against them and charge some other people instead.

I made it clear to Mr. Mohapi (counsel for the police) during argument that the view I hold is the police are not entitled to act unreasonably on the question whether the vehicles will be used as evidence or not. Similarly the detention of these vehicles should be well-grounded. It would be a mistake for the police to conclude that the vehicles ought to be kept until the end of trial.

It is wrong to conclude that automatically Applicant will have to apply for the release of the vehicles in terms of Section 57(1) of the *Criminal Procedure and Evidence Proclamation Act* of 1981. The reason being that this Section applies to vehicles that might have to be forfeited because of their involvement in the perpetration of the crime with the knowledge and

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participation of their owners. See *Goldberg v Minister of Justice & Another* 1952(2) SA 178 where it is stated confiscation and forfeiture are only justified if the owners are in *pari delicto* with the offenders. The owners of such vehicles are given a right to show cause why their vehicle should not be forfeited. This means the Crown and the police are obliged to keep the vehicles if they have grounds based on evidence that the vehicles might be the subject of confiscation or forfeiture.

Applicant's replying affidavit is critical of the fact that a lot of what the police say is speculative and at places hearsay. What Applicant's deponent says suffers from the same defect. Both sides have to rely on evidence of others as both parties were not there. Applicant's deponent wants what he says to be the last word. He virtually demands to be arrested if he is under suspicion. As I have said the whole matter is still under investigation. The outcome of the investigation is awaited.

In *R v Levack* 1961(1) SA 587 it was stated that the police must exercise a sound discretion in cases of seizure they must not unnecessarily use those powers to the prejudice of those affected. They must only retain or use what is sufficient to

prove the Crown case. In *Richards v The Attorney General* 18 SC 164 courts ordered the release of the seized property after it was clear that the Attorney General was no more acting reasonably in keeping the property as a potential exhibit. Some time had elapsed and the case was not proceeding consequently the Court had some evidence of abuse of power to act on.

Section 52 of the *Criminal Procedure and Evidence Act* 1981 provides that a policeman is entitled to seize property which "is concerned in or on reasonable grounds believed to be involved in the commission or suspected commission of an offence." This in my view means the same thing as seizing property which may afford evidence. required as evidence or can reasonably afford evidence. In *Wepener v Wheat Industry Control Board* 1950(3) SA 426 Clayden J interfered with the seizure and retention of property when there was abundant proof available to prove the Crown case and bags of oats had been seized and were being kept to prove contravention of the *Marketing Act* of 1937 concerning marketing of oats. At page 429 CD Clayden J concluded:-

> "So prepared for prosecution I do not think any reasonable person would say in addition. 'These bags of oats may be needed in evidence'. I cannot see even a remote chance that the bags of oats will be used."

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In this case the matter is still under investigation. We are obliged to assume that decisions concerning what will be used as exhibits will be taken fairly not maliciously.

Therefore it does not follow that even when investigations show that the owners of the vehicles are not involved and that the vehicles need not be made exhibits, the police should detain them. I have serious doubts whether the police without the advice of the Director of Public Prosecutions can know for certain whether these vehicles will or will not be used as exhibits. Once the accused are charged, the Director of Public Prosecutions becomes the *dominus litus* and not the police. The Director of Public Prosecutions is an officer of this court. It would be wrong and improper to assume that he would act improperly or maliciously. It seems to me that in applications of this nature where the accused has already been charged with the commission of an offence the Director of Public Prosecutions is a necessary party.

To return to the police, courts have taken a stand against the belief of the police that their discretion cannot be interfered with. In *Ikaneng Makakole v Officer Commanding CID and Another* C of A (CIV) No.18 of 1985 (unreported) the late

Miller JA summarised what may be the position of the police in this matter as follows:-

> "Briefly summarised their reason was that there existed grounds for suspecting that the car had been "concerned" in the commission of an offence or offences and that it was therefore proper to hold it, especially as it might in the course of time become subject of forfeiture to the State."

After going over the facts of the case Miller JA in *Ikaneng Makakole v Officer Commanding CID* (supra) dealing with the use of the police of the powers of detention of property concluded:

> "In short what is visualised by the legislature was purposeful detention. If a stage is reached when the detention appears no longer purposeful, there can surely be no point in the continued detention of the property."

It seems to me that once the decision is reached that the vehicles can be dispensed with as exhibits because they are unnecessary to prove the Crown case and there are no evidenciary grounds to *bona fide* believe they could be the subject of a forfeiture to the State, then the vehicles have to be released. As Davidson J observed in *Gottgeisl v De Klerk & Ano*, 1974(4) SA 403 at 407 the police acting in collaboration with the Attorney-

General (whose functions include those of the Director of Public Prosecutions) usually signify that the property is no longer required for purposes of an exhibit. I have already said where there are people who are criminally charged, that ought to be the decision of the Director of Public Prosecution. Where the suspects have not been criminally charged the matter is entirely in the hands of the police, who would are normally expected to seek advice before taking such a decision.

The opinion of Applicant in this matter can never be enough. The basis of that conclusion is not even been by any facts, it is a bare assertion. applicant was not even there when the vehicles were seized. Section 53 of the *Criminal Procedure and Evidence Act* of 1981 for the return of that property,

> "if it appears that such article is not required for purposes of evidence or for purposes of an order of court, the article from the person from whom it was seized....or if such person may not lawfully possess such article, to the person who may lawfully possess it."

The police or the Director of Public Prosecution need time. Applicant brought the application within two days of the seizure of the vehicles. That seems to me to be too short.

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Paragraph 8 of the opposing affidavit made on behalf of the First Respondent states the vehicle were near the place where the stolen property was seized. The police say they reasonably believe the vehicles were going to be used in furtherance of the crime with which their drivers are charged. Therefore the vehicles will afford evidence of the suspected commission of the offence charged. How the vehicles will do this is not clear. The police at this stage are probably not sure because investigations are continuing. I see no reason for pre-empting the investigations by releasing these vehicles. The police at paragraph 9 continue:

> "Police investigations have so far revealed a startling state of affairs involving the defrauding of the country of millions and millions of Maloti in a racket that extends beyond the territorial boundaries of Lesotho."

To persuade the Court that there was some abuse of power or unreasonableness some delay or lapse of time would help. In *Fako Griffith v Commissioner of Police & Another* C of A (CIV) No.9 of 1991 (unreported) Ackermann JA said he could accept that in "the case of the most complex commercial fraud case" a delay in the investigation and finalisation of the matter might be justified up to a point. This case seems to be a case of fraud extending

far beyond the borders of Lesotho, therefore some time ought to elapse before investigations are completed. It would therefore be wrong to push the police to make a hurried and precipitous decision that might cause the Police and the Director of Public Prosecutions to decide unnecessarily that these vehicles will be exhibits at the trial merely to gain time to continue their investigations. The powers of decisions ought to be exercised in good faith not to buy time. It could well be that when the investigations are completed the police or the Director of Public Prosecutions (in whose hands the case now ought to be) might decide the vehicles need not be kept as they will not be exhibits.

In order to emphasise the need to act with expedition I gave the police ten days to speed up investigations and make the necessarily consultation with the Director of Public Prosecutions in order to determine what is going to happen to Applicant's vehicles before trial. This Court has an inherent jurisdiction (even where no statute specifically authorises it) to see that there is no illegality or abuse of power amounting to unreasonableness by any authority or body. The following words of Trollip J in *Riddoch v Attorney General* 1965(1) SA 817 at 818 FG apply to both the Director of Public Prosecutions, the

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Attorney General and the police for that matter:-

> "The Attorney General must act with reasonable expedition in deciding what to do, and I have no doubt that, if he delays unduly in making his decision in any particular case, the Court can, and would at the instance of an aggrieved person, intervene and grant appropriate relief."

In intervening courts are always conscious of the fact that they should not usurp the discretion that has been assigned to other bodies and institutions. In this case the Court has ordered the First Respondent, the Commissioner of Police to give reasons in ten days' time should he find that the vehicles of Applicant ought not to be released. The Court would be failing in its duty of protecting the rights of individuals while ensuring that the public interest is not harmed, consequently it made the following order:

(a) First Respondent be given ten days to determine what his position at the trial will be about these vehicles.

(b) At the end of the period the First Respondent should cause an affidavit to be made putting to the Court what his position will be at the trial and the reasons for it, if he has not released the vehicles.

(c) The matter is postponed to the 17th March, 1995 and the *Rule Nisi* is extended accordingly.

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To facilitate effective decision making I direct that this ruling be served on the Director of Public Prosecutions who is now the *dominus litus* now that criminal proceedings are pending before the courts. I shall therefore expect the First Respondent to act under the directions of the Director of Public Prosecutions.

In future the Court will expect the Director of Public Prosecutions to be made a party to the proceedings where criminal proceedings have already been instituted.

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W.C.M. MAQUTU
JUDGE

For the Applicant : Mr. Buys
For the Crown : Mr. Mohapi