CIV/APN/144/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

KEKELETSO MOKOKOANA	APPELLANT
AND	
THE OFFICER COMMANDING POLICE AT ROBBERY AND CAR THEFT UNIT	1ST RESPONDENT
ATTORNEY GENERAL (N.O.)	2ND RESPONDENT

REASONS FOR JUDGMENT

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

On the 17th February, 1995 this matter was argued and I granted the order in terms of prayer 1 of the Notice of Motion as prayed promising to give reasons later.

Applicant had on the 4th May, 1994 filed an application for an order:

"1. Directing the Respondents to release Applicant's motor vehicles:-

(a) a Toyota Cressida, registration MRX 382 T,

/...

Chassis Number RX 725505758 and Engine Number 22R 2418046;

(b) a Toyota Hilux Van, a rebuilt vehicle;

(c) a Toyota Hilux Van, registration OBW 19590, Engine Number 4Y0080068 and Chassis Number RN 40128095.

2. Directing Respondents to pay costs hereof;

3. Granting Applicant such further and or alternative relief as this Honourable Court deems fit."

The application was supposed to be made on the 16th May, 1994 if unopposed. The application was served on both respondents on the 4th May, 1994.

According to Applicant, the three vehicles were seized by the police on the 28th March, 1994. The police had a warrant to search for different vehicles from the ones that were seized. They seized these vehicles because (according to Applicant) they suspected them to be stolen.

/..

On the 4th May, 1994 when the application was brought, the police had (in respect of the three vehicles) still not charged applicant with theft or any crime. To put the gist of the application in applicant's own words:-

> "Ever since the said seizure, these officers have not preferred any criminal charges against me on these vehicles. Their seizure is baseless and without purpose and my attorneys have informed me that this is unacceptable."

It seems (from Applicant's own affidavit) that he had previously been in possession of two vehicles that were on the search warrant. The police had in the past seized those two vehicles six times and on each occasion released those vehicles to Applicant.

It seems the police (on the six occasions they had seized Applicant's two vehicles) acted reasonably and fairly. They correctly followed up their suspicions through proper investigations. Once they found there was insufficient evidence to sustain a criminal charge they released those vehicles. When they went for those two vehicles the seventh time, they found

/..

Applicant had sold them.

I will not go into whether or not the police were justified in seizing the three other vehicles, which they were not looking for. The reason being that they made reasonable allegations justifying the detention of those vehicles. Furthermore the search was phrased in broad terms. Indeed Applicant does not challenge the seizure of his vehicles. He only challenged the keeping of these vehicles for a long period without a criminal charge against him being preferred.

The matter could not proceed in May 1994 because the police were on strike. Consequently the respondents could not take instructions. The matter was postponed several times.

On the 10th June, 1994 Police Officer Paul Kumi of the Criminal Investigation Division made an opposing affidavit. In it he says the search warrant entitled them to seize the four vehicles as they did. He has no knowledge of what happened in the past. The search warrant marked "A" of Applicant's affidavit shows two vehicles 4x4 Toyota Hilux registration numbers OBW21281 and RXV606T. The search warrant also authorises the police to seize other vehicles with or without registration numbers.

/..

Police Officer Paul Kumi then states that the vehicles mentioned in prayers 1(a) and (b) have already been identified by the complainants. He then concludes:

> "applicant will in due course be charged with theft of the said vehicles wherein they will be used as exhibits."

Police Officer Paul Kumi adds that Applicant's documents do not really take the matter further because they were issued after the vehicle had been stolen. He concludes:

> "I have been informed by my attorney and I verily believe same to be true that property seized as exhibits and retained by the police cannot be released until the criminal case in relation thereto has been finalised."

The advice given to this investigating officer has exaggerated the extent of police powers beyond permissible length in any society with any concept of the rule of law and rights of property. In the first place as more fully appears in *Minister van Wet en Orde v Damis Motors (Midland) Edms* 1989 (1) SA 926 the

onus in the matter is on the State. First they have to prove Applicant possessed the vehicle unlawfully. Secondly failure to produce proof that they made enquiries about the vehicles documentation and that it is erroneous does not help the State to discharge that *onus*. Their vague suggestion that they did so is not enough, especially when this allegation is disputed.

Up to the granting of Applicant's application on the 17th February, 1995, Applicant had not been charged and there was no criminal case pending before any Court.

Justice delayed is justice denied. The police know that they are duty bound to respect the liberty, life and property of the people. The police and the courts are entitled to hold property of a suspect:-

> "for so long as may be necessary for purposes of any examination, investigation, trial or enquiry..." See Section 17(4) of the *Constitution of Lesotho* under the heading Freedom from Arbitrary Seizure of Property.

It is trite law that accused people are entitled to a speedy trial. The police seize property that shall be used as an exhibit in terms of Section 52 of the *Criminal and Procedure Act*

/..

of 1981.

The intention is not that they should keep the property indefinitely without charging the accused with the theft of the property he is suspected of stealing. For Police Officer Paul Kumi to assume he can charge a suspect "in due course" at his own convenience is to act unreasonably something no officer of the state is entitled to do. The police are not entitled to seize people's property put it outside the charge office and forget about it while it deteriorates every day that passes.

On the 24th June, 1994 Applicant queried the fact that Police Officer Kumi had failed to produce an affidavit substantiating the allegation that South African authorities registered a stolen vehicle. He also challenged Police Officer Kumi's allegations as he had failed to produce affidavits from complainants. The view of Applicant was that if the police had such evidence they could have charged him. Applicant concluded by saying:-

> "It is amazing that police should seize property then investigate thereon. This only shows lack of reasonable suspicion."

/..

The matter was not heard on the 2nd August, 1994.

On the 30th November, 1994, the matter was set-down for hearing on the 8th February, 1994 and Respondents were served the same day. It is my view that this set-down should have reminded the police of these vehicles even if they had forgotten about them. Consequently they should have continued investigations where they had left off. Their failure to do anything about Applicant's case did not strike me as proper and fair.

On the 8th February, 1995 I asked Mr. Mapetla who appeared for the Attorney-General why Applicant had not been charged with any criminal offence. His reply was that he had received no instructions from the police although the matter had been set down as long ago as the 30th November, 1994. Mr. Nthethe for Applicant was anxious to proceed claiming the vehicle was deteriorating and that the delay was prejudicial to his client. I noted his legitimate concern and made the following order:-

> "The matter is postponed to the 17th February, 1995 at 2.30 p.m. to enable Mr. Mapetla to find out why no criminal proceedings have been instituted against applicant. Costs of the day are awarded to applicant."

/..

On the 17th February, 1995 when we found Applicant was still not charged with any offence I directed that police officer Paul Kumi should come before so that he could explain personally what was going on. The Court was adjourned for 30 minutes to enable that police officer to be present. The Court was leaning over backwards to accommodate the police as far as possible. The police officer in question was not found.

When argument began Mr. Mapetla for the Attorney General handed to me an affidavit that was made by the said investigating officer explaining what was going on. I was not unimpressed by it because in it he was simply saying he was busy with other things. He was only going to go to Eldorado Park, Johannesburg in three days' time (which would be the 20th February, 1995) in order to resume the investigation of the matter. There are very advanced methods of speedy communication such as the fax and the telephone, why he had to go to Johannesburg and not Qwaqwa and Bethlehem where the registration of the vehicle took place was not clear to me.

It was also a matter of concern that the affidavit dated 16th February, 1995 disclosed that the Public Prosecutor in September 1994 on receipt of the police docket referred it back

to the police because the Public Prosecutor was not impressed with it because the docket

> "was lacking in certain vital respects and that further investigations had to be conducted." See paragraph 4 of the affidavit of Paul Kumi dated 16th February, 1995.

I have already stated that whenever powers that are properly conferred on any public official are abused, especially in an unreasonable manner, the courts are obliged to intervene. The reason being that illegality has crept into what had begun as a lawful exercise of a power intended to be used properly for the public benefit.

Mr. Nthethe referred me to the case of *Ikaneng Makakole v Officer Commanding CID Maseru* C of A (CIV) No.18 of 1985 (unreported). This case is in many respects similar to this one.

In that case the police had eight months before the application was lodged legitimately seized a car because they considered its possession by applicant to be based on fraudulent documents. The police kept the vehicle in their possession and

sometimes used it for their purposes. Miller JA at page 4 said:

> "Moreover, no prosecution had been instituted in respect of any offence concerning the car during the lengthy period that has elapsed since the police took possession of it, there does not appear to be any justification for the continued detention thereof. It must be recognised that the statutory provisions relating to detention of property generally anticipate prosecution for a relevant offence... In short what was visualised by the legislature is a purposeful detention. If a stage is reached when the detention appears no more purposeful, there can surely be no point in the continued detention of the property. It appears to me that in this particular case that stage was reached some time ago and it is just and proper to release the car to applicant as the person who was in *bona fide* possession at the time of its seizure."

For the above-mentioned reason the appeal was upheld with costs and the order of the Court below dismissing the application set aside and in its place substituted an order releasing the vehicle to Applicant. The police had very strongly resisted the application on the grounds that it was stolen because the whereabouts of the suspected seller were unknown.

This case is in many respects similar to this one because the police allege the existence of complainants they cannot disclose. After eleven months they still have not charged Applicant with any offence. The Public Prosecutor has found the

police have not made out a case and returned the docket to them. After five months they still have not found evidence on the basis of which the Public Prosecutor could proceed against the accused. It does not even appear that Applicant was ever charged with any offence when the vehicles were seized from him by the police.

In the case of *Fako Griffith v The Commissioner of Police & Ors* C of A (CIV) No.9 of 1991 (unreported) Ackermann JA dealing with delays in investigations said:-

> "The lapse of time (which would be unwarranted even in the most complex commercial fraud cases) is wholly unjustified in the present instance. The appellant is entitled to have the case against him proceeded with immediately or the charge against him withdrawn forthwith."

The delay in that case was considerably longer and the accused had been charged. In this one the Applicant has never been charged with the commission of any offence.

Initially the police seem to have been conscious of the fact that they should not keep people's property for unduly long periods. That is why in the past, they kept taking two of Applicant's vehicles and returning them, until that process had

/..

been repeated six times. It is surprising that they are clinging to these vehicles although they are not making any progress with their investigations.

In the case of *Nthabiseng N. Molapo v Officer Commanding (Maseru) and Another* CIV/APN/280/92 (unreported) I was as hesitant to release a motor vehicle in similar circumstances because:-

> "...I felt that criminal proceedings are a bed-rock on which law and order and the stability of society and other human rights rest. Without encouraging laxity and insensitivity that could lead to the perpetration of oppression with impunity by the Crown, I felt the Court was entitled to know the facts surrounding the delay of the criminal case against the accused."

In this case the Applicant has not even been charged. The police just seized his vehicle and proceeded with their investigations, presumably deriving some assistance from the presence of accused's vehicles in their possession.

Even where the suspect is not in prison and there are no limits set, Trollip J in *Riddock v Attorney General for Transvaal* 1965(1) SA 817 at page 818 FG remarked:-

> "No time is fixed in the Act in which the Attorney General must take a decision, but the whole policy of the Act is that the accused must be brought to trial without undue delay... The Attorney-General must act with reasonable expedition in deciding what to do, and I have no doubt that, if he has delayed unduly in making a decision in a particular case, the court can and would, at the instance of the aggrieved person, intervene and grant appropriate relief." (The underlining is mine).

This applies even more to the police. The Public Prosecutor on behalf of the Director of Public Prosecutions found there was no case that could stand before a court of law and directed the police to investigate the matter further. The police find themselves too busy to follow his instructions. The Court cannot allow the police to file and forget the matter while Applicant's vehicles are deteriorating in their custody. The police, like all other public servants, are obliged to serve the public expeditiously.

While each case should be determined according to its merits, I was satisfied that the ends of justice would be better served by granting the application as prayed. There were no grounds for keeping applicant's vehicles for over eleven months when the police were not making any progress and charging the accused of any crime.

/..

I therefore granted the application in terms of prayer 1 of the Notice of Motion.

W.C.M. MAQUTU
JUDGE

For Appellant : Mr. G.G. Nthethe
For the Crown : Mr. Mapetla