CIV/APN/36/93

IN THE HIGH COURT OF LESOTHO

In the matter between:-

Lydia Mamohase Mahanetsa	Applicant
vs	
David Mandipaka	First Respondent
Makatiso Ramaisa	Second Respondent

Before the Honourable Chief Justice B.P. Cullinan

For the Applicant : Mr S.N.A. Mathe
For the First Respondent : Mr K.K. Mohau
For the Second Respondent : No appearance

JUDGMENT

Cases referred to:

(1) Lambons Ford vs Chabalala & Others CIV/T/377/89, Unreported;

(2) Attorney General vs Basotho National Party & Others, CIV/APN/323/93, Unreported.

Upon the death of her husband, the second respondent filed an application in this Court (CIV/APN/5/93), pursuing an order for inter alia the possession of the matrimonial property. There were six respondents to that application, excluding the present applicant. Included in the matrimonial property was a Toyota Corolla ("the Corolla") motor vehicle, registration number LBW 626T. The second respondent was successful in her application, the Court confirming its interim order that *inter alia*.

"the 1st and 2nd Respondents and/or their agents shall ..... be restrained from disposing of in any manner whatsoever Applicant's property listed ......"

Such property had been listed by the second respondent to the present application. I should add that the "1st and 2nd Respondents" to whom reference was made in the Court's order were respectively the father of the deceased, and a lady with whom the deceased had entered into a second ceremony of marriage. The point is that the order was not directed against the present applicant.

The second respondent had included the Corolla among the matrimonial property listed by her indicating that the vehicle was in the possession of another lady in Leribe. It transpired that it was in the possession of the present applicant. The Deputy Sheriff, the first respondent to the present application, proceeded to Leribe where he, so he deposed, in execution of the Court's order, took possession of the vehicle.

The applicant then filed an application (CIV/APN/36/93) in this Court, seeking the return of the vehicle, and an interdict restraining both respondents or their agents from interferring with her use of the vehicle. The applicant deposed that the vehicle had been taken from her without her consent, as she had produced to the first respondent a bill of sale reflecting, as she had already informed him, that the deceased had sold the vehicle to her on 10th September, 1992, for the sum of

R11,500.00. Her affidavit was supported by that of Paseka Ramaisa, the elder brother of the deceased, one of three witnesses to the bill of sale. Suffice it to say for the moment that in an opposing affidavit subsequently filed, the first respondent denied ever having been shown such bill of sale, deposing that when verbally informed by the applicant of such sale he had "advised her that I am executing .... my duties and her remedy would in the circumstances be interpleader summons".

In any event, when the applicant first approached this Court, on 28th January, 1993, she did so *ex parte,* seeking a rule *nisi* in the matter. She was then represented by her Attorney, Mr Mokhele Thabiso Matsau. The Court granted the rule, its order in respect of the first prayer taking immediate effect as an interim order. As to such prayer, the notice of motion sought an order calling upon both respondents on the return date to show cause why,

> "The 1st Respondent shall not be directed forthwith *omnia ante* to restore to the applicant certain Toyota Corolla car bearing registration numbers LBW 626T, and to recover the vehicle from whomsoever he delivered."

The Court granted the rule on 28th January. On 29th January the Attornies who had previously represented the second respondent in her application to this Court (CIV/APN/5/93) composed and signed a notice of intention to oppose. It read in part:

"KINDLY TAKE NOTICE THAT the Respondents herein hereby intend to oppose the above matter".

The notice went on to say that "the Respondents" had appointed their Attornies' offices as the address at which "they will accept" process. The notice was signed by "Respondents' Attorneys." It was served on the applicant's Attornies on 1st February and was filed on 2nd February. With it was filed an opposing affidavit sworn by the first respondent, which had been sworn in some date in January, that is, on or after 28th January, no opposing affidavit was filed by the second respondent.

Meanwhile on 1st February the applicant had filed another urgent application, with the same proceedings (CIV/APN/36/93), citing the first and second respondents, this time seeking an order "that the 1st Repondent be found guilty of contempt" of the Court's interim order of 28th January. The application was supported by an affidavit from the applicant, deposing that the said order had been served on the first respondent on 28th January, but that he had failed to return her vehicle to her. Another notice of intention to oppose was filed, on 3rd February (though mistakenly dated 3rd Janaury), by the same firm of Attornies who had filed the first such notice. This time it notified that "the 1st Respondent herein hereby intends to oppose the above matter "(presumably the contempt proceedings). The notice was signed by the "1st Respondent's Attorneys". Although the second respondent was so cited in the application and the

notice of motion was also addressed to both respondents, the application was diverted against the first respondent only, so that only he was required therein to indicate his opposition thereto.

Thereafter the applicant's Attorney Mr Matsau himself swore an affidavit, as also did his clerk Mr Thabo Tsoaeli in the contempt proceedings, on 5th and 4th February respectively. The first respondent also swore and filed a further affidavit on 5th February, in answer to the applicant's affidavit in the contempt proceedings.

Ultimately the Corolla was recovered by the applicant, so that there being no need to pursue that application, the rule therein was discharged by the Court, costs being reserved however. The issue for determination therefore is that of the alleged contempt. The case of Lambons Ford vs Chabalala & Others (1) illustrates the difficulty of attempting to weigh evidence for the applicant, in the form of affidavits, in the scale of things, in contempt proceedings, that is, when the respondent choses (as it is a matter of choice) to give viva voce evidence. I ordered therefore that the deponents who had sworn affidavits give evidence viva voce. The applicant having deposed to no more than the non-delivery of the vehicle, however, which aspect was not contested, I saw no need to hear her evidence. Mr Matsau, having sworn an affidavit in the case, had briefed Mr Mathe, who thereafter represented the applicant.

In his affidavit opposing the application for possession of the Corolla the second respondent deposed inter alia,

> "I am not in a position to comply with the court order as I have already handed over the motor vehicle to the 2nd Respondent and I am unable to locate her despite numerous attempts to do so"

The jurat to the second respondent's affidavit is incomplete, in that it is dated "January 1993", the day of the month being left blank, a most unsatisfactory, indeed improper omission on the part of the deponent and also the particular Commissioner of Oaths. The latter's name is not printed on the affidavit, as it should have been. Again the only stamp on the affidavit would seem to be that of the Assistant Registrar, so that there is no indication as to the day on which the affidavit was sworn. I observe, incidentally, that there are two other affidavits on the Court file in which the same Commissioner has not printed his name and in one of which the day of the month is again not stated, a matter which should be drawn to the attention of the particular Commissioner. There is a return a service indicating that the first respondent was served, on Thursday, 28th January, with the Court's order of that date. His affidavit was filed on 2nd February, so that all I can say, for the moment is that the affidavit was sworn on some day between Thursday 28th January and Tuesday 2nd February, both dates inclusive.

On 5th February the first respondent, as I have said, swore and filed another affidavit, opposing the contempt proceedings. Therein he deposed

> "I aver as I did in the main application that I handed the said car over to the Second Respondent herein on the very day I retrieved the car from the Applicant. Since I was served with the Order of Court in CIV/APN/36/93, I have made endless attempts to meet the Second Respondent so as to comply with this order of Court but all in vain. I am willing to obey the Order of Court but circumstances are beyong my control, I cannot perform impossibility".

Mr Matsau's affidavit is in sharp contrast. It had meanwhile been sworn and filed on 5th February. It is necessary to herewith reproduce most of the affidavit:-

> "2. On or about the 30th day of January, 1993 the First Respondent came to my office to make an enquiry regarding certain Deputy Sheriff fees due to him in the matter KHALI and STELZER. We got to talk about the Interim Order made by the Honourable Court directing him to return the vehicle to the Applicant. He telephoned the Second Respondent in my presence and informed her that the vehicle had to be returned. I did not hear what the Second Respondent said on the other side of the line but the First Respondent informed me that he was going to meet the Second Respondent around 12.00 O'clock noon in the offices of the

Respondent's Chambers in Maseru. He thereupon undertook that the vehicle would be returned to my client.

3. On the 2nd day of February, 1993 the 1st Respondent came to serve an opposing affidavit in the main application. I asked him about the whereabouts of the vehicle in the presence of my clerk Thabo Tsoaeli, and he replied that the vehicle was with 2nd Respondent and the latter refused to release the vehicle to him. On the 3rd day of February, 1993 the First Respondent came again to my office to make further enquiries about the aforesaid Deputy Sheriff fees which had not yet paid to him. He was in he company of a certain gentleman whose names I do not know. The First Respondent had that time received the Notice of Application regarding the contempt proceedings. He asked me what he had to do in the circumstances since the Second Respondent refused to release the keys of the vehicle to him. I told him that he must seek advice from his Attorneys of record in that regard. However I told him that he must appear in Court to explain to the Honourable Court the circumstances regarding the vehicle. The First Respondent further said to me that if I would pay him the Deputy Sheriff fees due in the KHALI matter he would be able to go and two the vehicle from wherever it was stored. I thereupon asked him whether he knew where the vehicle was stored. He replied that he knew that the vehicle was being stored at the premises of one Mr Thabiso Sekeleloane here

in Maseru. He stated however that the keys were with the Second Respondent."

Mr Matsau's clerk Mr Thabo Tsoaeli also swore an affidavit it read in part:

"2. On or about the 2nd February, 1993 the 1st Respondent came to our office to give us a copy of his Opposing Affidavit. Mr Matsau then called me and the 1st Respondent into his office. In the office Mr Matsau asked 1st Respondent where the vehicle was. His answer to the question was that the vehicle was with the 2nd Respondent. He stated further that the 2nd Respondent refused to release the vehicle to him when he went to collect it from her.

3. On or about 3rd February, 1993 the 1st Respondent came to our office to serve us with a copy of his Opposing Affidavit. I asked him where the vehicle was. He answered by saying that the vehicle was still with the 2nd Respondent and that the latter was refusing to release the ignition keys of the said vehicle to him."

Mr Matsau and Mr Tsoaeli both gave evidence viva voce. They both confirmed the contents of their affidavits. As contempt proceedings are in the least quasi - criminal in nature (at least one academic authority considers they are criminal in nature), the Court found that the applicant had established a prima facie case, and informed to first respondent that he might, if he

wished, give or adduce evidence viva voce. The First respondent elected to give evidence. He testified that he adhered to the contents of the affidavit where he swore on 5th Febraury. He specifically denied that he had informed Mr Matsau that the vehicle was "in the possession of one Thabiso Sekeleloane" and further that, if he was paid the fees arising in another matter, he could then afford to pay for the vehicle to be towed, from the latters premises. Again in cross- examination he maintained that Mr Tsoaeli was "not willing to tell the truth when he said I said second respondent wasn't willing to hand over item."

In cross-examination, however, the first respondent conceded that he had, as it was put to him, "numerous meetings with Mr Matsau." He conceded that he did telephone the second respondent on 30th January. He volunteered that, on that occasion "she promised to meet at her office but she didn't come". He was then asked, "When?", and he replied, "That was on the 2nd". In re-examination he testified that,

> "I phoned the second respondent. I had already gone to her before I telephoned her. I did not meet her. I did not find motor vehicle when I went there. I was told she had gone to the Republic of South Africa to prepare for a burial".

The first respondent's particular reply under cross - examination, reproduced above, "That was on the 2nd", indicates that on 30th January the second respondent had agreed to meet him

on the 2nd February. When questioned by the Court in the matter, however, he testified.

> "I delivered the vehicle to the second respondent in Maputsoe. I don't know the number of (her) house.
>
> I went to Maputsoe before the 30th January. The vehicle wasn't there. I don't know her (the second respondent's) place of work. On the 30th January I told her I had been served with a Court Order to come and take vehicle. She said she would come to Maseru and we would meet at Mr Nthethe's office on same day, for 12 noon. She didn't come.
>
> I went to Maputsoe on 1st February. She wasn't there. I went there on Thursday 4th February en route to Butha-Buthe. I didn't find her. Since then I haven't been there".

I pause here to record that on the basis of all the evidence before me I considered that a prima facie case of contempt by the second respondent had emerged from such evidence. Mr Mathe suggested that the contempt proceedings could be served upon the second respondent and I ordered that the notice of motion in respect of contempt be amended, so as to include the second respondent in the relevant prayers therein, that it be served upon her, together with all relevant papers and a certified copy

of the verbatim evidence adduced so far. Service upon the second

respondent was not effected however. the particular Deputy Sheriff being informed by the second respondent's two brothers "that the second respondent has gone to hospital in the Republic of South Africa since the beginning of February this year." Mr Mathe thereafter informed the Court that the Deputy Sheriff "could not trace" the second respondent and that "everyone says she is in the Republic." The question of contempt was not therefore pursued by the applicant against the second respondent. The alleged contempt involved being a civil contempt, it seems to me that hereafter the initiative lies with the applicant in the matter.

As for the first respondent, the evidence must be weighed in the light of all the circumstances of the case. The second respondent filed a notice of intention to oppose on 2nd February, 1993. The notice had been made out and signed on 29th January, 1993, however. Yet since then she did not file an affidavit in opposition to the main application. The first respondent did file such an affidavit. As I have already indicated, though filed on and possibly sworn as late as 2nd February, it was prepared and typed out in January, presumably on or after the date of giving instructions to his Attornies. It would seem therefore that the affidavit was prepared on Friday 29th January or Saturday 30th January.

The applicant had submitted in her founding affidavit that the Court's order in the previous proceedings (CIV/APN/5/93) no more than ordered the first and second respondents in those proceedings "and/or their agents from disposing of (in) any manner whatsoever (the present second respondent's) property" listed in an attached affidavit. The applicant then submitted that that order did not authorize the Deputy Sheriff to seize property which was not in the possession of the particular respondents or their agents and in respect of which there was no evidence of my impending disposition. Suffice it to say that I would agree with that submission. In any event, one would have expected the first respondent to react thereto on the basis that he had acted as he maintained, "within the four corners" of the Court's order. But the affidavit which he filed, all eight pages and eighteen paragraphs thereof, went much further than that.

The affidavit consisted for the main part of an outright attack upon the validity of the applicant's averments and supporting documents and indeed the averments of the deceased's elder brother, as to the sale of the vehicle to the applicant by the deceased. The first respondent deposed that the bill of sale was a fake, that signatures had been forged, that even a police motor vehicle clearance contained a forgery, in that the validity thereof had been extended from seven to twenty-one days. The main application is no longer before the Court but I have to say, however that the latter allegation, for which there is no apparent support, serves but to emphasise the seeming

recklessness of some of the allegations. Again, the allegations as to forgery go to the extent of comparing the similarities in two marks made by an illiterate signatory.

But apart altogether from the sustained intensity of the attack upon the applicant's bona fides contained in the affidavit, the point is that such attack should never have been mounted by a Deputy Sheriff. He it was who deposed that he had advised the applicant that her remedy was an interpleader notice: I would have thought that that approach was a Deputy Sheriff's prerogative under rule 51 (1) (b) of the High Court Rules. But rather than adopt that approach, we have the situation where the first respondent not only failed altogether to remain impartial, but indeed descended into the arena on the side of the second respondent, to the extent indeed that he also engaged the services of her Attornies, and swore an affidavit the vast majority of which one might have expected to emanate from the second respondent. And that is the extraordinary feature about this case, that is, that the second respondent, having entered an appearance, failed altogether to file an opposing affidavit, and that which is sworn by the first respondent should, for the main part, have properly emanated, if at all, from the second respondent.

In this respect the first respondent deposed that

"The Applicant has failed to make out a case for mandement van spolie as at no stage does she aver peaceful and undisturbed possession".

When questioned by the Court in the matter, however, the first respondent testified that he did not understand the term "mandement van spolie" and did not "know what a suit in spoliation is." Clearly, therefore, the first respondent was prepared to sign and to swear to the contents of an affidavit which he did not fully understand, a matter which gravely reflects not only upon the deponent but also upon the person who drew up the affidavit. Indeed, when one considers the length and intensity of the affidavit, the nature of the allegations therein, and the virtual disappearance of the second respondent I very much doubt whether the greater proportion of the affidavit in opposition in the main application emanated from the first respondent at all. So much so that I am left with the impression that the first respondent allowed himself to be manipulated in the matter by the second respondent, if not also the person who drew up the affidavit in question.

On the issue of credibility the first respondent has demonstrated his lack of respect for an oath. Furthermore, he clearly was not telling the truth when he stated, on 29th or 30th January, that he was "unable to locate (the second respondent) despite numerous attempts to do so" : on his own evidence he knew her address and was in telephonic contact with her on

30th January. Again, her and his Attornies had obviously been in contact with her on 28th January. Indeed, I find it quite extraordinary that there should be any difficulty in locating the second respondent, when she had recently, by order of this Court, been put in possession of a house and no less than eight vehicles. Suffice it to say that I completely accept the evidence of Mr Matsau and Mr Tsoaeli in the matter. Mr Tsoaeli was unable to corroborate Mr Matsau's evidence as to the first respondent's reference to one Mr Thabiso Sekeleloane: but that was due to the fact that Mr Tsoaeli was not present at the particular time. Suffice it to say, therefore, that I am satisfied that, despite his evidence in this Court, the first respondent was at one stage willing to comply with the Court's order but was obstructed in doing so by the second respondent. Indeed, it will be recalled that when the first respondent visited Mr Matsau on 3rd February he was in the company of another, who was unknown to Mr Matsau. Mr Mathe in cross-examination enquired as to the identity of the stranger. The first respondent replied that he did not "know his names very well" but that he was a "person who usually helps me with his transport". That evidence, if anything, tends to reinforce the evidence that, in the face of the contempt proceedings, the first respondent had resolved, without possession of the keys of the vehicle, to have the vehicle towed back to the applicant.

That he failed to do so may well have been due to a lack of funds, back that he failed altogether to concede the truth of Mr Matsau's evidence and to reveal to the Court the whereabouts of the vehicle, can only be a further indication of his manipulation by another or others. There is no doubt that towards the end of his evidence, when he was being questioned by the Court, the first respondent did display a greater willingness to cooperate and to pursue the production of the vehicle, but the sticking point remains that he failed, as I have said, to reveal the location of the vehicle. To that extent I am satisfied that the first respondent was in contempt.

I would be slow, however, to formally enter a finding and record a conviction, with all the criminal stigma attaching thereto, for a number of reasons. Firstly, the first respondent had been a Deputy Sheriff for but one year at the time, and clearly had very little conception of the proper role to be played by him in the matter. Secondly, there is the aspect of his manupulation by another or others. Thirdly, I consider that to some degree he ultimately displayed a degree of cooperation. As the Court observed in the case of Attorney - General vs Basotho National Party & Others (2) at pp 79/81, sometimes an appropriate order to make in case of the present nature is an order of costs. I consider such an order to be appropriate in the present case. Accordingly I order that the first respondent bear the applicant's costs of the contempt proceedings.

As to the main application, although the rule therein was discharged, it could equally in the light of the second respondent's failure to file an affidavit in opposition, have been confirmed. In any event, correspondence by the Registrar on the Court file indicates that it required intervention by the police before repossession of the vehicle was achieved by the applicant. In all the circumstances, therefore, bearing in mind the order of costs against the first respondent, I order that the second respondent bear the applicant's costs of the main application.

Dated this 19th Day of July, 1995.

B.P. CULLINAN

(B.P. CULLINAN)

CHIEF JUSTICE

Handed down by me on 21/12/95

J.L. Kheola

C.J.