CIV/APN/387/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MATHABO NTHABISENG JANE — Applicant

and

NEO JULIUS MANKIMANE — Respondent

For the Applicant :Mr. Ramakhula

For the Respondent :Mr. Mohau

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi
on the 12th day of December,. 2002

The Applicant filed an urgent motion in September 2001 in which she applied for the following:

1. .....

2. ..... a *rule nisi* calling upon Respondent(s) to show cause why:

   (a) Pending the outcome of prayer (b) below Respondent shall not be ordered to deliver at the premises of Ned-

bank Mohale's Hoek motor vehicle registration number CBD 133 FS (the car).

(b) Applicant shall not be declared as the owner of a certain motor vehicle registration CBD 133 FS. (the car)

(c) Respondent shall not pay costs of suit.

(d) Applicant shall not be granted further and or alternative relief.

3. That prayers 1 and 2 shall not operate as Interim Interdict with immediate effect.

The Applicant's founding affidavit had been supported by the affidavits of Josiah Mothoana Seepheephe, Khahliso Mohale, 'Ma-Ema Makhetha and Bernard Benny Molapo. Consequent upon Applicant's Counsel motion in Court interim order was granted on the 27th September 2001 in terms of prayer 2(a) above. The effect of the amendment was to enable the messenger of Court to take possession of the car to where it would be stored in accordance with prayer 2 (a)

The application became opposed by the Respondent who filed his own answering affidavit. In response the Applicant filed a replying affidavit which was supported by the affidavits of Khahliso Mohale and Mothoana Seepheephe.

Barring for the intervening application for contempt of Court against the Respondent it became clear that the Applicant once she had got possession of the

vehicle through the Interim Order she became no longer keen to proceed with hearing the main application. The result would be that the vehicle would deteriorate where it had been kept before its fate would be decided by this Court.

It was common cause that a vehicle had been bought by the Respondent from Burchmores in Bloemfontein and registered in his own name as registration papers (page 36-6) show. I did not think it was an issue that Applicant referred to the car as registration CBD 133 FS while it was in fact CDB 133 FC.

It was also not disputed that for the purchase of the car and its other parts and spares the money came from the Applicant who funded the purchase of the car. See the different deposits slips which were annexed to the proceedings. All in all the value of the purchase of the car, the engine and other parts did not exceed M18,000 as it became common cause.

It was further common cause that the Applicant and Respondent were lovers. At around the time the vehicle was bought the Respondent could have been looking for a job at Metropolitan Insurance which he later secured. Even more important in the parties relation was this that after the purchase of the car

the parties separated because the Respondent had got himself a new lover or was about to marry. Most of this facts would form a useful background to this dispute about the ownership of the car.

The Applicant's case is that yes indeed the car may have been registered in the name of Respondent but this she protested against over a long time in vain The vehicle is hers. She further deposed that she sought an advance from her employer Bank to buy the car. For the selection of a car and arrangements she was merely assisted by the Respondent. It was a matter of surprise and confirmation to notice that the Respondent had registered the car in his own names.

On the other hand the Respondent denied that the car belonged to the Applicant. He admitted however that the Applicant did give him money with which to buy a motor vehicle as a gift to the Respondent. It was never intended that the vehicle was being bought for the Applicant . It was a gift as Respondent said inasmuch as Respondent was about to take up new employment in which he would seriously need a car for transport. This further explained why the vehicle was registered his (Respondent's) names.

The Respondent finally contended that the matter was neither urgent nor

one fit to have been brought by way of application in the light of material and genuine dispute of facts which the Applicant should have foreseen when she launched her application. That the Respondent's attitude had been determined refusal or denial that the vehicle belonged to Applicant. Since about March 2001, when she became aware of the Respondent's attitude the Applicant should have proceeded earlier to come to Court. If not the other was no longer urgent. All in all the following were the issues that were debated in argument before this Court.

Firstly, whether or not the present application should have been brought to the High Court without leave in terms of section 6 of the High Court Act 1978 since the matter was within the jurisdiction of a subordinate court. This was so it was contended, in the light of the fact that the value of the car which did not exceed M18,000 (Eighteen Thousand Maluti) Mr. Mohau referred in that liquid to the case of **Ntaote v Shale CIV/T/194/99** delivered by this Court on the 18th October, 2002 and cases cited therein. See also **Makhetha v Makhetha** 1974-1975 LLR 153 that this case would only rightly by this court be decided once there had been requisite leave or when the matter was brought *mero motu* to the High Court. To this Mr. Ramakhula most wisely conceded .

I found no special reasons why the matter should have been brought to

this Court. Regrettably neither would I direct that the matter be transferred to the Subordinate Court. On this point alone I would dismiss the application because it was a fatal irregularity to have brought the matter which should have been brought in the Subordinate Court where it belongs.

The second question was whether this was a proper case for motion ex parte and or urgent basis. I found that the matter was not one for proceedings at least without notice. Indeed all indications were against the matter being urgent. Following the Respondent's attitude whether before or around that time when Respondent's father was asked to intervene it was clear that the matter had been urgent (see paragraph 11.7 of the Respondent's answering affidavit). The Applicant did not then take appropriate steps.

Even though the Applicant averred that she was "more apprehensive that unless the car was delivered to her for safekeeping at the premises of Ned- bank she may loose the car for good in the even of a Writ of Execution being issued against Respondent all indications showed otherwise. In the first place the dispute about the ownership of the car had been long simmering starting from since about March 2001.

If the Applicant's fear was that the vehicle would disappear the

Respondent could well have safely caused its disappearance or disposal. So the Applicant have not spoken of urgency when she had waited since March 2001 to come to Court. She should have earlier even come to Court because as she said there had been misunderstanding between herself and Respondent. This was so when their relationship was going sour and Respondent appeared not ready to release the vehicle as the Applicant herself said that had been the situation.

It could not have been an amelioration against the misconceived claim that the vehicle had only been placed for safekeeping. Substantially the vehicle had been delivered to the Applicant. That made for the impression that the order granted had been unfairly granted in all the circumstances more so when it had been without notice.

I agreed that it was trite that *ex parte* application constitute "a negation of the fundamental precept of *audi alteram partem*" and for that reason they should not be resorted to lightly. See **Republic Motors v Lytton Service Station** 1971(2) 516 (R) at 518 as referred to with approval in **Lutaro v NUL** 1999-2000 LLR-LB 52 at 60.

It was submitted by Applicant that the dispute of fact in this matter was

not forseable. Mr. Ramakhula's feeling was that there had been no need to even ask the Court to direct that the matter be referred to oral evidence because there was no gonven dispute of fact. For example at paragraph 11.7 Respondent said that at the end of July 2001 he had remarried when Applicant attended on Respondent's father and asked that Respondent bring back the car. Respondent stated that he said this in the presence of others including Khahliso Mohale (one of Applicant's supporting deponents) I thought that besides this impinging on the question of urgency. It also seriously touched on whether the matter could capably be decided on the papers. And furthermore whether the Applicant could have foreseen that a genuine dispute of fact would arise. This made the question of ownership even more difficult to decide.

I found that on the basis of jurisdiction aaand lack of the application ought to be dismissed and rule therein discharged . The Applicant reserves the right to re-institute the case of the car's ownership in a proper claim.

For clarity the car should revert to Respondent's possession.

The order is made with costs to the Respondent.

T. Monapathi
Judge