

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) 4/2007

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

1ST APPELLANT

ATTORNEY-GENERAL

2ND APPELLANT

AND

KALAKE MOFUBETSOANE

RESPONDENT

CORAM: Ramodibedi, P

Smalberger, JA

Scott, JA

Heard 26 March 2009

Delivered 9 April 2009

Summary

Appeal against order of the High Court directing the return of a vehicle or damages in lieu thereof, as well as an award of damages for malicious prosecution – onus on the respondent (plaintiff) to prove ownership of vehicle – evidence reviewed – failure by respondent to discharge such onus - institution of

criminal proceedings against respondent justified in the circumstances – no case made out for malicious prosecution – appeal allowed.

JUDGMENT

Smalberger, JA

[1] The respondent (as plaintiff) instituted action in the High Court against the appellants (as defendants) as far back as February 1999. The action arose out of the alleged wrongful seizure by members of the Royal Lesotho Mounted Police Service on 1 February 1998 of a Toyota Hi-Ace (“the vehicle”) which the respondent claimed belonged to him and was operated as a taxi for his benefit, and his subsequent prosecution on a charge of robbery. In the action the respondent claimed the restoration to his possession of the vehicle, alternatively, an amount of M59,400.00, being its fair market value at the time of seizure; payment of the sum of M2,440.00 per week from 1 February 1998, being the average weekly amount earned by him from the taxi business for which the vehicle was used; payment of the sum of M30,000.00 as damages for malicious arrest, detention and prosecution; interest on the amounts claimed and costs.

[2] The matter came before Mofolo J. It is not clear when the trial commenced. The learned trial judge eventually delivered judgment in favour of the respondent on 2 April 2007. He granted all the relief claimed save for the respondent's claim for weekly loss of earnings. In passing it should be mentioned that the amount of damages awarded for malicious arrest, detention and prosecution was M50,000.00 which was substantially in excess of the amount of M30,000.00 claimed. This was clearly an error on the part of the trial judge, as Mr Ntlhoki for the respondent fairly acknowledged.

[3] The appeal record is incomplete in a number of respects. Problems were experienced in the preparation of the record because some of the tapes on which the evidence was recorded have gone missing. This remains a constant cause for concern and we would once again emphasize the need to ensure that records of cases are kept safe. Counsel for the parties apparently co-operated in the preparation of an appeal record which meets with their approval. Their efforts in that regard are appreciated. While making due allowance for the various factors that have contributed thereto, the long delay in finalising this matter is to be regretted.

[4] The background to the present appeal is as follows. The respondent claims to have been the owner of the vehicle at all relevant times. It is common cause that the vehicle was seized by the police on 1 February 1998 at Butha-Buthe on suspicion that it had been stolen during an armed robbery on 6 July 1997. At the time of its seizure the vehicle was being operated as a taxi on behalf of the respondent. Consequent upon these events the respondent was charged in the Maseru Magistrate's Court with robbery. He pleaded not guilty. The essence of the case against him was that the vehicle belonged to one Lucas 'Mekoane (" 'Mekoane"); that it had been the subject of an armed robbery on 6 July 1997 during the course of which shots were fired; and that the vehicle was subsequently recovered and traced to his possession.

[5] 'Mekoane testified at the respondent's trial. The vehicle was present before court. 'Mekoane claimed in evidence that the vehicle was his and identified it according to a number of distinguishing features, one of which was a bullet hole in the roof. While 'Mekoane was still under cross-examination the vehicle, contrary to the instructions of the presiding magistrate, was removed to South Africa where it was seized by the South African police on the grounds that it had been reported stolen in South Africa. The vehicle has since not been returned. It is common

cause that the removal of the vehicle led to the frustration of the criminal trial, the abandonment of the prosecution and the acquittal of the respondent.

[6] The main issue before Mofolo J was that of ownership of the vehicle. In order to succeed in his action, it was incumbent upon the respondent, in the first instance, to establish ownership of the vehicle on the requisite balance of probabilities. The respondent testified that on 1 February 1998 the vehicle belonged to him. It bore the registration number AL586. He produced a registration card which reflected that the vehicle was registered in his name under that number. Such registration card amounts to no more than *prima facie* proof of ownership. He claims to have shown the card to the police at the time of his arrest. Somewhat surprisingly (and perhaps significantly) the respondent was never asked precisely when, where and from whom he had acquired the vehicle, and he produced no proof of purchase. He further testified that there were no justifiable grounds for his subsequent arrest, detention and prosecution on a charge of robbery, and he relies upon the conduct of the police, in particular the circumstances relating to the removal of the vehicle to South Africa, as indicative of malice on their part.

[7] After giving evidence the respondent closed his case. The appellants called five witnesses in rebuttal. The first of these was 'Mekoane. He testified that the vehicle was purchased by him from Maseru Toyota on 24 March 1994. As proof of purchase he produced a receipt from Maseru Toyota. He also produced a registration card reflecting that the vehicle was registered in his name under registration number AF 563. He possessed the vehicle until 6 July 1997 when it was stolen in the course of an armed robbery while it was operating as a taxi between Ha Leqele and Maseru. In the course of the robbery shots were fired. Evidence regarding the events surrounding the actual robbery was given by one Seema whose evidence was not seriously challenged.

[8] According to 'Mekoane it was reported to him some months later that the vehicle had been seen operating as a taxi on the route between Ficksburg and Butha-Buthe. With the help of others he searched for, and found, the vehicle. He followed it to Butha-Buthe where the driver abandoned it and ran away. He further testified that at the trial of the respondent he identified the vehicle as his with regard to a number of features, of which the bullet hole in the roof was one. It is common cause that 'Mekoane did so purport to identify the vehicle as his.

[9] The appellants further called as a witness Inspector Kholoanyane of the South African police, a member of the vehicle theft unit stationed at Ladybrand. He claimed to have knowledge and experience of conducting tests on vehicles suspected of having been stolen or tampered with. It is common cause that he examined the vehicle which at that time bore the registration number AL 586. The engine number purported to be 4Y7098142. He suspected that this was not the original number and conducted a test, which he described as an etching process involving the application of acid, to determine the true state of affairs. The test revealed the original engine number to be 4Y9089129. Further inquiries using the South African police computer data system showed it to be the engine number of the vehicle which had previously been reported stolen by 'Mekoane. It also, according to the evidence, corresponded with the engine number reflected in the documentation relating to the vehicle which had been produced by 'Mekoane. Kholoanyane prepared a report recording his findings. The report was included in the police docket which was forwarded to the prosecutor who took the decision to charge the respondent with robbery. This was confirmed in evidence by the prosecutor concerned, one Nthako.

[10] The above is an outline of the salient evidence which has a bearing on the issues in the appeal. It is unnecessary to traverse the evidence in any greater detail.

The trial judge appears to have been incensed by what he considered to be the prejudice suffered by the respondent because of the irregular conduct of the police in removing the vehicle from the jurisdiction of the court, leading to its non-return. Having regard to the totality of the evidence, I am at a loss to understand where such prejudice lay. The absence of the vehicle did not preclude proof of its ownership. If anything the events may have favoured respondent in bringing a premature end to his prosecution and allowing him to escape possible conviction.

[11] It is perhaps because of his annoyance that the trial judge's assessment of the evidence and findings are lacking in objectivity and proper analysis. He concluded that the evidence of 'Mekoane was "very doubtful" and that he found it "extremely difficult to take [his] evidence seriously". He provided no substantiation for such finding, and seemingly ignored the documentary evidence which supported 'Mekoane, his identification of the vehicle (including the circumstances surrounding its recovery) and the corroborating evidence of Kholoanyane. With regard to the latter the trial judge held that "his evidence was to say the least worthless some Crown witnesses having discounted it. I have rejected it outright". No acceptable reasons have been advanced for the contemptuous dismissal of Kholoanyane's evidence. He was a South African policeman who was independent of the investigation against the respondent. He was called as an

expert witness. There is no apparent reason to doubt either his objectivity or his veracity. Nor, on analysis, can the evidence of other witnesses be said to detract from his evidence. That he conducted a test and furnished a report reflecting what he said in evidence, cannot be gainsaid. The rejection of his evidence out of hand was wholly unjustified.

[12] The main issue on appeal, as I have previously indicated, is whether the respondent succeeded in proving ownership of the vehicle. The fact that the vehicle was at one time registered in the respondent's name cannot materially advance his case. There are many ways in which registration can be achieved without proper proof of ownership. There are no probabilities that favour the respondent's evidence, nor is there any basis on which his evidence can be accepted above that of the more compelling evidence of 'Mekoane, supported as it is by convincing documentation and the findings of Kholoanyane. The respondent has accordingly failed to establish ownership of the vehicle; indeed on the evidence one would be entitled to find that 'Mekoane's claim to ownership of the vehicle was proved.

[13] It follows that the respondent's claim for the return of the vehicle or damages in lieu thereof should have been dismissed in the court below. Nor can his claim for malicious arrest, detention and prosecution succeed. In order to establish such a claim it would have been necessary for the respondent to prove, *inter alia*, that the police in arresting, detaining and causing the respondent to be prosecuted, acted without reasonable and probable cause, and with malice (or *animo injuriandi*). (See *The Minister for Justice and Constitutional Development and Others v Moleko* [2008] ZASCA 43, para [8].) On the information available to the police and the prosecuting authorities at the time, the decision to prosecute the respondent cannot be said to have been unreasonable or tainted by impropriety. There is no proof of malicious conduct on the part of those concerned. In this regard too the appeal must succeed.

In the result the following order is made:

1. The appeal is allowed, with costs.
2. The order of the court *a quo* is altered to read:

“The plaintiff's claims are dismissed, with costs.”

J. W. Smalberger
Justice of Appeal

I agree

M. M. Ramodibedi
President of the Court
of Appeal

I agree

D. G. Scott
Justice of Appeal

For the Appellants : Adv. M. Mapetla

For the Respondent : Mr. M. Ntlhoki