

IN THE HIGH COURT OF LESOTHO

In the matter between:-

TSELE MOHOSHELA

APPLICANT

AND

OFFICER COMMANDING THABA-TSEKA POLICE

1ST RESPONDENT

ATTORNEY-GENERAL

2ND RESPONDENT

J U D G M E N T

Delivered by the Honourable Mr. Justice M.M. Ramodibedi,
Acting Judge on the 9th day of August, 1996.

It is common cause that on or about the 8th December, 1994 the police under First Respondent stopped the Applicant on his way to his shop informing him that they were "checking on vehicles and would like to see the registration certificates" of the Applicant's vehicles. The latter went back to his homestead and brought back the registration certificates in respect of "three vehicles which were parked at my home, namely F0225, B1009 and a hilux (toyota) van with registration numbers E 1348." (see paragraph 7 of Applicant's founding affidavit and the admission thereof by the Respondents in paragraph 8 of the opposing affidavit of policeman Motseki Nkeane.

It is further common cause that the police then seized the aforesaid three motor vehicles which were parked at Applicant's home and took them to the police station where they "searched" them in the presence of the Applicant and then released the toyota van with registration numbers E. 1348.

The other two motor vehicles were detained by the police.

It is common cause, further, that the police did not prefer any charge whatsoever against the Applicant in respect of any of the aforesaid motor vehicles. Policeman Motseki Nkeane avers in paragraph 16 of his opposing affidavit:

"It is admitted that no charge has as yet been preferred against anybody due to the fact that we were hoping that we would get some assistance from the applicant and the person from whom he bought the vehicles in order to solve the matter may be even without having to go to court which assistance is not forthcoming. Applicant can not be allowed to possess a vehicle which does not have proper documents. As stated earlier the blue card relate (sic) to a datsun not a nissan van and there is also tempering (sic) of engine and chassis number. We are still trying to get assistance from the South African Police in order to test whether our suspicion regarding the tempering (sic) can be confirmed."

It was against the aforesaid background that on the 3rd day of January, 1995 the Applicant filed an urgent application with this Honourable Court for an order in the following terms:-

- (a) Dispensing with the periods of notice required by the rules of court on the grounds of the urgency of this matter;
- (b) Directing First Respondent and/or officers subordinate to him to release forthwith Applicant's motor vehicles with registration numbers F0225 and B1009 and their registration certificates.
- (c) Alternatively to (b) directing First Respondent and/or officers subordinate to him to bring Applicant before a court of competent jurisdiction in

relation to the said vehicles so that Applicant may be dealt with in accordance with the law;

- (d) Directing Respondent to pay the costs of this application;
- (e) Granting Applicant further and/or alternative relief.

I observe at this juncture that Applicant's challenge to First Respondent to release the said motor vehicles or bring him before a court of competent jurisdiction was addressed to the First Respondent in writing by Applicant's attorney on 13th day of December, 1994 in terms of Annexure "TM1" to the Applicant's founding affidavit. I attach significance to the fact that this challenge was neither taken up by the First Respondent nor did he bother to reply to the said letter. This is certainly one of the aspects to which this court must inevitably attach due weight.

I also attach significance to the fact that the aforesaid Applicant's motor vehicle registration B1009 was subsequently released to him. A clear picture then emerges, in my view, of the police going on a fishing expedition to "check" and seize Applicant's motor vehicles at random without any reasonable suspicion of a crime having been committed and then releasing some of them if and when it suits them.

After a few postponements this application was finally argued before me on the 2nd day of August, 1996. The application predictably centred on motor vehicle registration F0225 only. I inquired from counsel who appeared before me whether any charge had now been preferred against the Applicant. Both Mr. Pheko for the Applicant and Mr. Putsoane for the Respondents were unanimous that no charge has ever been preferred against the Applicant to date. I will come back to this aspect later.

Basically Mr. Putsoane opposes the Application for the release of the motor vehicle in question on three grounds namely:-

- (a) that the motor vehicle in question was not properly registered in as much as (so the argument goes) the blue card thereof is in the name of S.W. Russell and not the Applicant's.
- (b) That the motor vehicle in the police custody is a Nissan and not a Datsun.
- (c) That Kekeletso Mokokoana from whom the Applicant alleges to have bought the motor vehicle in question is not the person who is referred to in the blue card.

It seems to me that Mr. Putsoane's submissions (a) and (c) above relate to one and the same issue. In dealing with these submissions it is important to note that Applicant's claim is not based on ownership but on possession. It is true he states in paragraph 5 of his founding affidavit that at all material times "I have been the lawful owner and possessor" of the motor vehicles in question". But in paragraphs 11 and 12 of his founding affidavit the Applicant clearly states that "all those three vehicles were not yet registered in my names as there has not yet been effected any change of ownership." He adds in paragraph 12 thereof:

"I then informed the said officers that I had bought two of the said vehicle (sic) from one Kekeletso Mokokoane and was still waiting for him to sign change of ownership forms."

In my judgment it would be far fetched to expect the Applicant's names nor even those of Kekeletso Mokokoane to appear in the blue card in question in the circumstances. A person's names only appear in the blue card at registration following change of ownership which will often be after full payment has been made and the vehicle in question has been transferred to the new "owner".

Section 11 of the Road Traffic Act No. 8 of 1981 provides as follows:

- (1) A motor vehicle or trailer the ownership of which has been transferred by the registered owner, shall not be used on a public road for more than 21 days after the date of such transfer unless the new owner is registered the owner thereof.
- (2) On changing ownership of a motor vehicle or trailer the registered owner shall within 7 days from the date of such transfer where the vehicle is registered with the registering authority in Lesotho :-
 - (a) transmit to the registering authority a notice of transfer of ownership in the prescribed form, competent by the transferor and transferee, and shall deliver to the transferee, not being a motor dealer;
 - (i) a copy of the notice of transfer of ownership;
 - (ii) the registration certificate, vehicle licence and clearance certificate in respect of and in so far as they are applicable to such vehicle;

- (iii) a certificate from the registering authority that the registration relating to the motor vehicle or trailer was issued by that authority;
 - (iv) a certificate from the Lesotho Mounted Police to the effect that the motor vehicle or trailer is not suspected of having been unlawfully acquired;
 - (v) in the case of transfer of ownership of a motor vehicle or trailer which has been registered in Lesotho for less than two years, a certificate from the Lesotho Customs Office to the effect that the motor vehicle or trailer has been cleared in accordance with the law relating to customs;
- (b) the transferee shall thereupon, apply to the registering authority for the transfer of the registration certificate to his name upon the production of the documents referred to in (a) and upon payment of the prescribed fee to the licensing officer. "

It is clear from the above section that the law does envisage a situation where a person may "own" or possess a motor vehicle merely armed with the former owner's registration certificate as long as the motor vehicle in question is parked as in the present case and it is "not used on a public road."

Regarding Mr. Putsoane's submission (b) above that the motor vehicle in the police custody is a Nissan and not a Datsun it seems to me that he conveniently overlooks the Applicant's explanation that "the said Kekeletso Mokokoane bought the external parts of a Nissan while the internal parts remained those of a Datsun." I consider that this explanation may reasonably possibly be true. But then Mr. Putsoane complains that this explanation came late at a replying stage. I agree with Mr. Pheko however that this explanation was a

natural response to paragraph 9 of Motseki Nkeane's opposing affidavit in which he stated:-

"Contents thereof are admitted. I wish to further inform the Honourable Court that the blue card which was produced by applicant which purportedly related to the nissan van reflected that it related to a datsun not a nissan van the model of the said datsun was a 1980 model while the nissan van which is a subject matter of this application is a model which first came into the market in 1988."

It was thus necessary and natural for the Applicant to explain how the motor vehicle in question came to have the external appearance of a nissan.

In my judgment the onus is on the First respondent to justify the seizure of Applicant's aforesaid motor vehicle(s) and to show that the police had a reasonable suspicion that the motor vehicle in question was stolen. Paragraph 12 of Motseki Nkeane's opposing affidavit falls short of satisfying the test of reasonable suspicion. He merely states:-

"It is denied that whoever said the vehicles were being seized because applicant bought them from a thief. The vehicles were seized because they were being suspected of being stolen or otherwise not properly acquired. Applicant was further informed that engine and chasis numbers appeared to be tampered with and that we wanted to make further investigations in respect of the said tampering."

I emphasise that the test is reasonable suspicion not just suspicion based on the whims of the beholder. That is precisely the whole import of Section 52 of the Criminal Procedure and Evidence Act 1981.

As to the alleged tampering of the engine and chasis numbers I observe that Section 15 of the Road Traffic Act 1981 as amended provides as follows:-

- (1) "A person driving, or found in possession of a motor vehicle or trailer, the chassis or engine number, or other identification mark which has been obliterated or tampered with otherwise than by a registering authority under sec. 9, is, unless he proves to the court that,
- (a) in the case of a motor vehicle or trailer purchased from outside Lesotho, such obliteration or tampering was done by a lawful authority of the place where the vehicle was purchased;
 - (b) he did not know or could not have known that the number had been tampered with, is guilty of an offence and liable to imprisonment for a period of not less than 2 years without the option of a fine."

It seems to me that the words "otherwise than by a registering authority" were intended to make the registering authority the main role player in determining whether there has been unlawful tampering of chassis or engine numbers. It was for this reason that the court inquired from Mr. Putsoane whether the respondents had filed any affidavit from the registering authority in question as there was none in the court file. Mr. Putsoane assured the court that no such affidavit had been filed. I find this strange and unacceptable regard being had to paragraph 16 of Motseki Nkeane's opposing affidavit in which he claims:

"....we are still trying to get assistance from the South African police in order to test whether our suspicion regarding the tempering (sic) can be confirmed."

One would have thought that if the police were really serious and acting responsibly in the matter the easiest thing would have been to contact the registering authority and have his affidavit filed in the matter.

Be that as it may I am satisfied from the facts and circumstances of this case that the Applicant is at least a bona fide possessor. In this respect I observe that he is unchallenged in his material averment in paragraph 5 of his founding affidavit wherein he states:

"At all material time, I have been the lawful owner and possessor of two motor-vehicles; namely a Nissan van with registration numbers F0225 and a Canter truck with registration numbers B1009. I do not recall the engine and chassis numbers of the said vehicles by memory."

In his reply Motseki Nkeane merely says in paragraph 7 of his opposing affidavit :-

"Contents thereof are not within my personal knowledge and put applicant to proof thereof."

I consider that this affords no answer to Applicant's allegation that he is the lawful owner and possessor which therefore remains unchallenged.

In Steven Mokone Chobokoane vs A.G. C of A (CIV) No.15 of 1984 Aaron JA put the point succinctly as follows: "In Motion proceedings, it is not an adequate answer to say" I put the Applicant to the proof thereof. The affidavit made by the Appellant constitutes not only his allegations but also his evidence, and if this is not contraverted or explained, it will usually be accepted by the Court. In other words the affidavit itself constitutes proof, and no further proof is necessary." With respect I entirely agree.

In coming to the conclusion that the Applicant is a bona fide possessor I have also taken into account the fact not only that the Applicant denies the alleged tampering of chassis and engine numbers but also that the police have not charged him with any offence for such a long period of time stretching to eighteen (18) months now. There was no indication even as the matter was being argued before me as to whether any charge would be forthcoming and if so when. In the circumstances I hereby draw an adverse inference from the conduct of the police that they have no genuine case against the Applicant and that the latter's possession is bona fide.

The Court mero motu pointed out to Mr. Putsoane the decision of the Court of Appeal in

Ikaneng Makakole v The Officer Commanding C.I.D. Maseru and The Attorney General C of A (CIV) No. 18/85.

The Court was taken aback when Mr. Putsoane submitted that the aforesaid decision of the Court of Appeal is "wrong". That may well explain the strange attitude of the police in this matter. One needs hardly emphasise that the Court of Appeal is the highest court in the country and that its judgments are binding upon this court.

The main principle laid down in Ikaneng Makakole vs The Officer Commanding C.I.D. and Another (supra) is that "the statutory provisions relating to detention of property generally anticipate prosecution for a relevant offence." In other words "what was visualized by the legislature was purposeful detention" (my underlying). I respectfully agree.

It is significant that in Ikaneng Makakole's case (supra) the motor vehicle in dispute had been in police custody for nine (9) months. In dealing with this aspect ~~Miller~~ J.A. had this to say:

"If a stage is reached when the detention appears no longer to be purposeful, there can surely be no point in continued detention of the property. It appears to me that in this particular car that stage was reached some time ago and that it is just and proper to release the car to the Applicant as the person who was in bona fide possession thereof at the time of its seizure."

These remarks are apposite to the application before me and I respectfully adopt them in toto. I find it totally unacceptable in this case that full eighteen (18) months have gone by without any charge being preferred against the Applicant and that in the meantime his motor vehicle is detained in circumstances that do not rule out eternity. It seems to me that the balance of convenience also favours the Applicant who obviously needs his motor vehicle "in the conduct of my business" as he puts it in paragraph 24 of his founding affidavit.

There is again the aspect of the motor vehicle in question wasting in police custody. In that regard the Applicant states in paragraph 25 of his founding affidavit:

"Furthermore, it is now a notorious fact that the longer the vehicles remain in police custody, the greater the chances of their being stripped of parts. Almost invariably the missing items are never found and the police always decline to pay for the said missing and/or damaged items; much to the detriment of the owner of the said vehicle."

Once more Motseki Nkeane's reply to this serious allegation levelled against the police is merely that "contents thereof are not within my personal knowledge".

As earlier stated this form of reply affords no answer or challenge to the Applicant's averment which in the circumstances I can see no reason for rejecting. Once more the balance of convenience and justice dictates that I should order the release of the said motor vehicle to the Applicant in the special circumstances of this case. I observe that the Court of Appeal in Ikaneng Makakole's case (supra) particularly took a deem view of the fact that the police also used the motor vehicle in question for their own purposes. With respect I share the same concern in this matter regarding the real likelihood of Applicant's vehicle being stripped of parts in police custody.

In the circumstances of this case as aforesaid, I have come to the conclusion that the continued detention of Applicant's motor vehicle in question is unreasonable in the extreme and serves no purpose particularly in the absence of any charge and having regard to the lengthy period that the said motor vehicle has already spent in police custody without any charge whatsoever. It appears to me that a stage has now been reached whereby the police action in this matter can be described as amounting to arbitrary seizure of property contrary to Section 17 of the Constitution of Lesotho which provides in part:-

"17 (1) No property, movable or immovable, shall be taken possession of compulsorily, and no interest in or right over any such property shall be compulsorily acquired, except where the following conditions are satisfied, that is to say -

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit; and

- (b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
- (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest in or right over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for -

- (a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled; and
- (b) the purpose of obtaining prompt payment of that compensation:"

I am satisfied therefore that the Applicant has an interest in the motor vehicle forming the subject matter of this application and that he has locus standi for claiming the relief sought by him. Nor does he have to be a bona fide possessor as such in terms of Section 17 of the Constitution his interest simply arising from the unchallenged fact that he bought the motor vehicle in question.

In the result the application is granted with costs and the First Respondent and/or officers subordinate to him are hereby directed to release forthwith to Applicant motor vehicle Registration numbers F0225 together with its registration certificate.



M.M. Ramodibedi

J U D G E

9th day of August, 1996

FOR APPLICANT : Mr. L. Pheko

FOR RESPONDENTS: Mr. T.S. Putsoane