CIV\APN\242\97

IN THE HIGH COURT OF LESOTHO

In the Application of :

SAMUEL MASEKO **Applicant**

Vs

'MABOITHATELO SOERE **Respondent**

J U D G M E N T

Filed by the Hon. Mr Justice M.L. Lehohla on the
9th day of September, 1997

On 5th August,1997 this Court gave a final order discharging the Rule which had been obtained on 10-7-97 by the applicant on a spoliation application sought *ex parte*.

The applicant's application styled "Notice of *Ex parte* Application" couched

in the manner reflected on papers indicated that on 10th July, 1997 the applicant would seek an order as follows :

1. That the Sheriff or his Deputy be authorised to attach and remove: 1989 Model Toyota Cressida 2.0, Registration number BDC 582 FS from the Respondent and restore Applicant's possession of the vehicle.

2. That the Respondent must furnish reasons to (this court) on a date to be determined why the Order must not be made final and why she should not be ordered to pay the costs of this application.

3. Further and\or alternative relief.

In his affidavit styled Supporting Affidavit the applicant avers that on 12th June, 1997 he visited Lesotho in his vehicle, a 1989 Toyota Cressida 2.0 with registration BDC 582 FS. His vehicle had some problems as a result of which he requested the respondent to temporarily store it at her house. On his return the following day he came to learn that the respondent wanted to buy this vehicle. Thereupon terms of sales were negotiated but were not conclusive. Owing to this

turn of events the applicant wanted to remove the vehicle but the respondent thwarted any such attempt in that she refused to return the vehicle to him.

The applicant avers that he filed a complaint with Butha Buthe police but notwithstanding this, the respondent persists in her refusal to return the vehicle to him and what is more she is using this vehicle unlawfully.

He alleges that he has always enjoyed quiet and undisturbed possession of this vehicle and charges that the respondent had no right to take the law into her own hands.

The applicant it appears is resident in South Africa because he gives his place of abode as 756, Extension 1, Bethlehem in paragraph one of his averments.

In her opposing affidavit supported by Johannes Mosese, the respondent sought to illustrate the incorrectness of the applicant's averments by indicating that the applicant expressed his willingness to sell her the vehicle in question for nine thousand Maluti (M9 000-00).

The respondent avers that the applicant returned to her the following day whereupon the respondent paid him the purchase price and the two went to Ficksburg where the vehicle was cleared in the presence of Johannes Mosese. The respondent says she even confirmed the agreement of sale between the parties in the presence of this Mosese. The Court sees for itself Annexure "C" styled Motor Vehicle Clearance dated 13-06-97 as reflected in the impression left on paper by South African police date stamp. M.E. Soere has appended her signature on Annexure "C" as the "person that tenders the vehicle for clearance".

Given just the set of circumstances set out immediately above it becomes doubtful whether the Court would have granted the interim order sought *ex parte* and without notice to the other party, if its attention had been brought to this. If as it turns out the court's attention was not brought to this set of circumstances, why is it so? Would it be wrong to infer that the applicant concealed this information because he must have known that if the Court knew about it then it would at least have been reluctant to issue an interim Court order? This conclusion seems irresistible to me even at this early stage of my evaluation and consideration of facts in this case.

The respondent goes further to indicate that she and the applicant proceeded

the same day to Butha Buthe police station for purposes of filling change of ownership papers. Thereupon the applicant surrendered the registration papers of the said vehicle. Thereafter the applicant handed over the vehicle to the respondent.

The respondent thus vehemently denies that she agreed to keep the applicant's vehicle. She charges that she wouldn't be so foolish as to negotiate purchase of a vehicle which already had problems. She denies that she refused as alleged to release the vehicle to anybody and states that the applicant parted with the vehicle in accordance with the concluded terms of the agreement of sale.

She admits that a complaint was lodged by the applicant whereupon the vehicle was seized by the Butha Buthe police, but is quick to explain and furnish proof that she successfully launched an application for the release of the vehicle to her in the Butha Buthe Magistrate's Court. See Annexure "B" moved as CC:64\97 before her worship Mrs M. Nthunya, a magistrate on 8th July, 1997. The order given that day at paragraph 3 of the said order is that "the first respondent (Officer Commanding police Butha Buthe) is directed forthwith to release to the applicant ('Maboithatelo Soere) the motor vehicle mentioned in 2 above". (2 above relates to the essential descriptions of the vehicle in question. These include engine and chassis numbers).

It is baffling again that the applicant made no mention of Annexure "B" which contains such vital information relating to a matter which must have firmly held possession of his interest even granting or making allowance for the fact that he was not cited as a party in those proceedings. On the score of Annexure "B" alone it would not be wrong to conclude that the respondent was in lawful possession of the vehicle at the time for the vehicle was placed in her possession by order of court in defiance of the police contentions to the contrary.

The respondent denies that she unlawfully deprived the applicant of his possession of the vehicle and vehemently says she came into possession only after the applicant voluntarily parted with that possession. She buttresses her contention by referring to Annexure "D" a certificate she avers the applicant even gave to her. This is a more particularised motor vehicle licence and clearance certificate. Of course the applicant denies ever giving Annexure "D" to the respondent and charges that she must have obtained it in the vehicle. But Johannes Mosese a member of South African Police Services in his support of the respondent bears useful testimony to the effect that parties to this litigation came to his offices on 13th June, 1997 for purposes of establishing whether the vehicle in question was reported as stolen at all anywhere and that it was reflected as not stolen.

I don't think it helps the applicant much to content himself with saying in relation to Mosese's affidavit the names of the Commissioner of Oaths are not given in full. I am aware of no such requirement in law.

The questions posed for consideration by *Mr Teele* are very pertinent and go to the heart of the matter in this proceeding. He sets out

(a) Is it competent for the applicant to obtain a final court order of restoration without seeking a rule *nisi* to afford a hearing to respondent?

(b) Has applicant complied with the rules of Court more especially Rule 8(22)?

I readily accept the submission that both questions must be answered in the negative for the following reasons :-

It would seem that the reasoning expounded by this Court in CIV\APN\253\92 ***Universal Engineering(Pty)Ltd vs The Deputy Sheriff and 2 Others*** (unreported) at page 2 was capable of leading to a faulty interpretation and therefore to a misstatement of the law on *mandamant van spolie* to the extent that it suggested an order sought *ex parte* and without a hearing being afforded to the respondent can in

all circumstances be final.

I thus fully endorse the criticism of the above authority and the reasoning adopted in CIV\APN\388\92 ***Lesotho Bank vs Matsie and Matsaba*** (unreported) at p.7 onwards where the following is expressed :

> "There is some authority to the effect that a spoliation order is appealable. In **Jones and Buckle** The Civil Practice of the Magistrates' Courts in South Africa, 8th Ed. Vol. I at page 33 the learned authors say that a spoliation order is a final and definitive order, and thus appealable.....".

See ***Pretoria Racing Club vs Van Petersen***, 1907 T.S. 687 at p.697 where Smith, J. Said :

> "In order to decide whether such an order is final or not, I think the test must be arrived at by considering that the object of the proceedings is as a matter of substance. See the Judgment of Romer L.J. in ***Re Herbert Reeves & Co.*** (1902) 1 Ch.D. 29.
>
> Now the substantial matter in dispute in the present application was the right of the respondent to the present possession of certain property; if an act of spoliation was established then his right was clear. That was the matter and the only matter decided by the learned judge, the consideration that legal proceedings might be subsequently instituted to test whether the possession could legally be sustained appears to me to be foreign to the question at issue, and the order made was, in my opinion, a final order within the meaning of the Rules of Court.
>
> We were pressed on behalf of the respondent to say that the order was

> interlocutory from a consideration of the consequences which would follow if an appeal from it was allowed. It was pointed out that if an appeal from a spoliation order is allowed the result will be to keep the matter in suspense so long that the remedy may become useless. With regard to this argument I would say, in the first place, that if the order is in its nature a final order; the Court would not hold it to be otherwise merely because its execution might be stayed and the remedy granted by it delayed. In the second place, the inconveniences spoken of do not seem to me to arise from the fact that an appeal from the order is allowed, but from the staying of execution of the order. An appeal from a decision of a judge in Chambers has to be prosecuted within fourteen days, and the matter should then be disposed of within a short time of the making of the order. In my opinion the appeal should be dismissed with costs".

Indeed emphasising the importance of the ***Audi*** rule Gauntlett AJA in C. Of A. (CIV) 37\96 ***Rakhoboso vs Rakhoboso*** (unreported) at p.6 said in June this year:

> "In a number of countries, however, the tide has however discernibly turned against the limitation applied in this way to the ***Audi*** rule, and in my view, correctly. ....."

The learned Judge of Appeal illustrated the important principle on which this rule is rooted by reference to the summary of De Smith, Woolf and Jowell **Judicial Review of Administrative Action** (5th Ed. 1995) 378-379 as follows :

> "That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the

> scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an 18th century judge to the events in the Garden of Eden".

In C. Of A. (CIV) 18 of 1991 ***'Masechele Khaketla vs Malahleha and Ors*** Ackerman J.A is instructive in his illustration of the principle that only a provisional order should be given if justified in motion proceedings and that such orders are not to operate with immediate effect unless

(a) the rules sanction such a cause or

(b) the very harm to be averted will be precipitated

© there are no interests of another party involved.

In the instant case what is clear is that the interest of the respondent would be adversely affected. The applicant stays in South Africa outside the jurisdiction of this Court and if the respondent was served with the interim Court Order and that court order which was obtained *ex parte* was executed with the result that the applicant was placed in possession there would be nothing to compel him to bring the vehicle within the jurisdiction of this Court on the return day. The result would be that applicant would be in final possession of the vehicle without the respondent having

been heard. That would be absurd.

In their invaluable works Silberberg and Schoeman's - **The Law of Property** 3rd ed. P.134 say :

> "The expeditious nature of the *mandamant* must, however, not be seen out of context. The mere fact that the application is one for *mandamant* does not automatically imply that the matter becomes one of urgency. A final order will not be granted *ex parte*. The respondent will be served with a rule *nisi* ordering him to show cause why he should not be ordered to restore possession at a future date. Usually the rule *nisi* is made to operate as an interim interdict restraining the respondent from alienating the thing".

It is a matter of grave concern that the applicant has made no attempt to comply with Rule 8(22) yet not only Silberberg and Schoeman have amply illustrated above that the mere fact that the matter is one of spoliation does not render it urgent but Munnik J. in ***Mangala vs Mangala*** 1967(2) SA 415 in reference to Rule 6(12)(b) which reads exactly the same as our Rule 8(22)(b) categorically laid the rule that the applicant must in his affidavit or petition

> "set forth explicitly the circumstances which he avers render the matter urgent....." See CIV\APN\89\96 ***Dorbyl Vehicle Trading Finance vs Mokheseng*** (unreported at p.10.

It would seem therefore an inexcusable remissness on the applicant's part that

the applicant's affidavit has not sought to ask the Court to dispense with the forms and service provided for in the Rules of Court.

The respondent's case on the other hand and notwithstanding the inconvenience of the rule obtained against her in breach of the *audi alteram partem* rule amply shows that

1. The vehicle was cleared
2. The registration certificate was handed over to her
3. There is independent evidence of sale.

Evidence has conveyed to me a firm view that the respondent has a good defence based on what Silberberg and Schoeman at p.140 paragraph 8151 say must satisfy the following requirements, to wit :

> ".....the deprivation of possession was not unlawful. Deprivation of possession will be lawful if carried out with the consent of the applicant .....or if it amounted to counter spoliation".

Given the circumstances outlined above I can think of no reason why the respondent if deprived of her possession of this vehicle by applicant she would not succeed in a spoliation proceeding.

All that the facts reveal is bad faith on the part of the applicant. Hebstein and Van Winsen **The Civil Practice of Superior Courts in South Africa** 3rd ed. pp 80-81 say an applicant must stand or fall by his founding affidavit. He cannot supplement his case in the replying affidavit. Furthermore regarding bad faith it matters not that the facts were withheld negligently wilfully or *mala fide.*

I have no hesitation in finding that the applicant's papers are lacking in procedural propriety, bristle with evidential improbabilities and are outright beset with deception.

The Rule was accordingly discharged with costs.

J U D G E
9th September, 1997

For Applicant : Mr. Snyman
For Respondent: Mr Teele