CRI/APN/667/2012

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX	**Applicant**
vs	
THE ATTORNEY GENERAL	**1st Respondent**
THE MAGISTRATE MASERU (Mrs. MOTHEBE)	**2nd Respondent**
THE CLERK OF COURT (MASERU MAGISTRATE COURT)	**3rd Respondent**
'MATHAPELO MAKARA	**4th Respondent**

JUDGMENT

Coram: **Hon. Hlajoane**

Date of Hearing: **11th December, 2012**

Date of Judgment: **20th December, 2012**

Summary

Application for stay of release to suspect of the vehicle suspected to have been stolen – Points in limine raised in particular for the procedure in

dealing with the matter- Points in limine dismissed as the right procedure of going by way of review proper.

[1] The Application was moved *ex parte* and on urgent basis for stay of an order for the release of a vehicle by the Magistrate Court in CR 2050/2011.

[2] There is no dispute that 4th Respondent is charged before the Magistrate Court for theft of the very vehicle subject matter in these proceedings. The matter is a part-heard as evidence of two crown witnesses has already been led.

[3] The case was postponed to February 2013, on the 3rd October 2012. 4th Respondent being the person charged of theft of that vehicle applied for the release of the same vehicle to herself on the 30th October 2012. The Application was opposed and the investigating officer and the crown counsel filed their opposing affidavits.

[4] The Court released the vehicle to the 4th Respondent. It was that order which this Court is being asked to review. But before going to the merits of this case there were some points in *limine* that were raised.

[5] There were four points that were raised being the following:-

(a) Lack of Urgency

(b) Non-Compliance with **Rule 8 (4) of the High Court Rules**.

(c) Jurisdiction

(d) *Lis Pendens*/Wrong Procedure

[6] Urgency

4th Respondent here says there is no urgency in this matter in so far as there has been no supporting affidavit by the complainant to say his interest would be prejudiced if the vehicle was to be released to the 4th Respondent.

[7] He argued that urgency was self created as the reason for urgency was not justifiable. But in response to that the applicant pointed out that service to the respondents would have defeated or rendered the relief sought nugatory or precipitate the very harm that applicant sought to avert.

[8] Besides, the investigating officer in deposing to the founding affidavit has shown that he was only made aware of the application for the release of the vehicle when he was subpoenaed and asked to respond to that application. He objected to such an application and was supported by the public prosecutor handling the theft trial which was already a part head matter.

[9] According to the investigating officer, the complainant being a person from Bloemfontein was not even before Court when the application for the release of the vehicle was argued.

[10] Applicant relied on the decision of this Court in **Bochabela Transport Operation v Hlotse Taxi Association and Others**[1] where it was held that service to the other party in urgent applications is only departed from in exceptional cases where likelihood is that service would render relief sought nugatory or defeat the relief sought to be averted.

[11] It would not be proper for the 4th Respondent to say that no reasons were advanced to have moved the Application *ex parte*. The valid point would be whether the reasons given were justifiable.

[12] The investigating officer has shown that the Application was about releasing the vehicle to the very same person who is suspected of having stolen it. Also that the complainant in that trial could not easily be called within a short space of time as he lived outside the jurisdiction of this Court. That was a valid reason to have moved application *ex parte*.

[13] Non-compliance with **Rule 8 (4) of the High court Rules.** 4th Respondent deposed to the opposing affidavit to say the Application was moved same day it was filed in total disregard of

[1] CIV/APN/7/2011

the above Rule. The interim Court Order also shows that the Application was moved on the 8th November, 2012. But on looking at the minute by the Judge, it has shown that the Application was moved on the 9th November, 2012 and made returnable on the 15th November, 2012.

[14] **Rule 8(4)** mandates that an Application moved *ex parte* must be filed with the Registrar before noon on two Court days preceeding the day it is to be set for hearing. When the Court minuted the return date it said;

> "Respondents are called upon to show cause on Thursday 15th November, 2012 why the interim orders may not be confirmed."

[15] Service was effected on 4th Respondent on the 12th November 2012 which happened to be on a Monday when the order had been given on Friday the 19th November, 2012.

[16] In stating the position of the law when dealing with *ex parte* motion proceedings respondents relied on the decision in **Sebili Mohale v Lesotho Electricity Corporation**[2] where the Court stated that non-compliance with **Rule 8(22)** does not absolve the litigant from complying with **Rule 8 (4) (5)** otherwise the applicant shall still be required to give justification for non-compliance.

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[2] CIV/APN/2003

[17] I have already shown above that the investigation officer deposed to the fact that they had to move fast as they were worried that the vehicle was going to be released to the suspect for safe keeping where there was a complainant who could not be reached that easily within a short space of time as he lived outside the jurisdiction of this Court. The Court considered that as a justifiable reason to have moved the application without notice.

[18] The Court of Appeal in **Takalimane v Serobanyane**[3] decided that an order for the release of motor vehicle suspected to have been stolen if made before the conclusion of criminal proceedings would be invalid.

[19] **Sections 55 and 56 of the Criminal Procedure and Evidence Act (CP&E)**[4] deal with the disposal of articles in a criminal case. But the emphasis is on the release to the person who may lawfully posses such articles. But again **sub-section (4)** allows for suspension of order pending appeal or review.

[20] Jurisdiction

Respondents argued that the High Court had no jurisdiction to entertain this application where there is a criminal case before the

[3] C of A (CIV) No.26 of 2011
[4] Act No.7 of 1981

Magistrate's Court for theft of that vehicle which case has yet not been concluded. But I have already shown above that **section 56 (4) of the CP&E** allows for suspension of the order pending review or appeal. The Magistrate's Court cannot review its own decision or appeal against it but the High Court.

[21] The Crown felt that the Magistrate had committed a cross irregularity to have released the vehicle to the very suspect who was being charged of theft of the same vehicle. It was for the Magistrate to have also heard from the person claiming the vehicle to be his releasing the vehicle.

[22] **Section 56(2)** of the **CP&E** clearly mandated the Court before giving an order for the disposal of articles seized in a criminal case, to hear such additional evidence, be it by affidavit or orally.

[23] *Lis Pendens*/Wrong Procedure

The Respondents are challenging the move to have applied for review of incomplete proceedings. They argue that the application is improper as pending cases are not subject to review. That it would have been proper to have appealed against the decision to have released the vehicle to the 4th Respondent.

[24] In response to this point applicant referred to the case of **Bofihla Makhubane v Lets'eng Diamonds & Another**[5] where it was held that for a claim of *lispendens* to hold, a litigant must prove that there is a pending case between the same parties, concerning the same subject matter and founded on the same cause of action.

[25] But in *casu* the Court is not dealing with the issue of guilt or otherwise of the 4th respondent, nor is the Court concerned about ownership of the vehicle in question. The Court is concerned about the legality and validity of the order made by the 2nd Respondent.

[26] Also as was decided in **Takalimane v Serobanyane** *supra* the Court did not find it improper to have approached the Court by way of review in challenging the decision by the Magistrate to have released the vehicle to respondent.

[27] The Court of Appeal decision reads;

> "The appeal is upheld with costs.
>
> (a) The order of the Magistrate, Leribe dated 2nd April 2009, directing that a Volks Wagen Golf Motor Car be released into the custody of the first respondent Serobanyane is reviewed and set aside."

[5] LC/16/2012 para 11

[28] The Court thus finds that 4th Respondents points raised in *limine* are without merit and they must all fail. They are thus dismissed.

A.M. HLAJOANE
JUDGE

For Applicant: Ms. Ranthithi

For 4th Respondent: Ms. Molapo