IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 252/2000

In the matter between

SELEPE O. SESOKO Plaintiff

and

THE COMMISSIONER OF THE
ROYAL SWAZILAND POLICE 1st Defendant

THE ATTORNEY GENERAL 2nd Defendant

Coram: J.P. Annandale, AC J

For Plaintiff: Mr. S. Madau of Robinson Bertram

Attorneys

For both Defendants: Mr. Msibi of the Attorney General's Chambers

JUDGMENT

1st December 2006

[1] In this action the Plaintiff sues for the complete loss of a motor vehicle which was impounded by the Police but destroyed in a fire at Lobamba Police Station.

[2] The dispute essentially centres on three aspects namely whether the Plaintiff is the owner of the motor vehicle that features in his claim,

liability of Government and the *quantum* of damages.

[3] The original particulars of claim has it that Plaintiff was the registered and beneficial owner of a rebuilt Toyota Venture, registered as DLH 078 NW, with engine number V0290473047, and VIN AAPV 0299890473047. He sought to amend the registration number to "HKJ 585GP, formerly DLH 078 NW."

[4] The Defendants objected to this amendment, firstly, based on two documents filed as annexures to the summons. The first of these, a "Certificate of Registration in respect of motor vehicle", issued by the registering authority in Pretoria on the 25th November 1990, reflects the registration number as "DLH 078 NW, rebuilt" with the engine and Vehicle Identification Number (VIN) the same as in the summons. The second document, annexure "A2", is a Motor Vehicle Licence and Clearance Certificate, seemingly also issued by the same office and officer, virtually simultaneously with the first, due to the same date, with the time indicated as the very next minute and the two certificate numbers in direct sequence (D 05020907 and D05020908).

[5] Both documents refer to a Toyota Venture with the VIN and engine numbers being identical and both referring to "Sesoko SO".

[6] The obvious anomaly, raised by the Defendants, is that these registration numbers differ. A further discrepancy was mistakenly made by the Plaintiffs attorneys of record, in a letter which they wrote to the 2nd Defendant, wherein the registration number was cited as BBR 345 V, which according to the aforementioned annexures is actually the vehicle register number, not registration number. No issue was made of this mistake, perhaps because it might not have been noticed. I refer to this in order to demonstrate how easily mistakes do happen, which may well result in unnecessary issues, such as the present.

[7] In his evidence, the Plaintiff produced both original documents of annexures "Al" and "A2", plus a number of other documents to which I shall refer below. His evidence is that he is the owner of a Toyota Venture, registered HKJ 589GP, which used to have the number DLH 078 NW.

[8] This vehicle, he says, was bought as an accident damaged scrap yard vehicle, which he bought for R39 000. He could not produce the original receipt but handed up as part of his evidence a fax which reflects just such a transaction (Exhibit "A").

[9] Nare Motors CC, doing business in Tembisa (Johannesburg), issued an invoice on the 19th November 1998 to S.O. Sesoko (Plaintiff) in

respect of a white Toyota Venture rebuilt vehicle registered as DHL 078 NW (the number in the unamended summons). It indicates the same engine and VIN numbers as are on the registration certificate. The invoice is endorsed to reflect that the front portion is damaged. The total cost is E39 000.00.

[10] There is no reason to doubt the authenticity of the document even though it is not the original.

[11] The Plaintiff then handed in as exhibit "B" a (by now barely legible) fax copy of a further invoice, this time for vehicle parts purchased from Deo Volente Auto Services CC in Primrose (Johannesburg) to the total amount of R19 912.38, in order to effect repairs on the same Toyota Venture vehicle.

[12] Thereafter, another (by now equally faded) fax (exhibit "C") which is an invoice from Trueway Panel beaters CC of Alberton (again in greater Johannesburg) which indicates "repairs" costing R7 410. He says this was to respray his vehicle. He also said that he misplaced the original invoices, hence faxed copies. Again, there is no reason to doubt the authenticity and the documents were admitted during the trial.

[13] The purpose of these papers is that it indicates that the Plaintiff purchased a damaged

Toyota Venture, bought parts for it and had it repaired, with a *prima facie* cost value of R66 322.38, according to his papers. His claim is for E65 000. The documents further indicate that it was registered as DHL 078 NW, a number used in the North West Province of South Africa. He says that as he was a resident of Gauteng, (Johannesburg and Pretoria or nowadays Tshwane) he was required to re-register it as HKJ 585 GP, as indicated in exhibit "E", the motor vehicle licence and clearance certificate. It has a missing round piece which was cut out to remove the clearance certificate or "licence disk".

[14] Before he could re-register, his further evidence is that he first had to obtain police clearance by the South African Police. As documentary proof of this, he handed up exhibits "Dl" and "D2." These are computer generated details relating to a white Toyota Venture, with vehicle register number BBR 345 V (the same as on exhibits "E" and "F") and with again the same engine and VIN numbers as on those documents as well as the purchase invoice. The registration number is shown as HKJ 585 GP, the previous number as DLH078NW and the owner as S.O. Sesoko of Laudium (near Johannesburg). It also indicates the clearance certificate number to be the same as the "control number" on exhibit "E", further that it has no SA Police mark and that the Police "cleared" the vehicle.

[15] In cross examination, the Plaintiff gave good account of the manner in which he obtained the vehicle and of its registration numbers. He agrees with Defendant's counsel that the police might have had a suspicion that all was not well with the vehicle, causing it to be impounded and that he did not move a formal application in court to have it returned to him.

[16] This arises from a (Defendant's) document (exhibit "G") which forms the basis on which the police obtained a court order (exhibit "H") to keep the vehicle in "*police custody pending further investigation until the 4* June 1999*".

[17] Seemingly, the suspicion is that the vehicle did not have the original engine and chassis numbers of the manufacturer and that a final report on this was awaited. No final report on the status of the vehicle was produced at the trial.

[18] The Plaintiff denies any tempering with any numbers but explained that it was accident damaged before he bought it and also that the engine number, to his own knowledge, could not be the original, which should be prefixed with a Toyota engine type number, such as 2Y or 4Y. He did not change the engine, but bought it with the same engine, had it checked and cleared by the South African Police and thereafter had it

registered in his own name, with a new Gauteng ("G.P.") number plate.

[19] The Plaintiff provided details of the manner in which the vehicle came to the attention of the police. His own intended use for it was to convey passengers from the airport but he failed to achieve this. He then lent it to a relative who apparently fell foul of the law, being a suspect in a robbery case. Apparently the vehicle was seen at the scene of the crime. The police then checked the vehicle and suspected that all might not be well, hence it was impounded in order to ascertain whether the vehicle might not perhaps be stolen.

[20] This court finds the evidence of the Plaintiff, on a balance of the probabilities, to be true and acceptable with regard to the manner in which he obtained the vehicle, *prima facie* as an innocent and *bona fide* purchaser. There is no reason to hold otherwise. Likewise, the value of the vehicle to him, at cost price, is on par with the value of his claim. Although the Defendant's counsel was instructed not to concede to it, and further that the going market rate at the time of the loss for such a vehicle in running condition has not been proven, I am satisfied that on all of the evidence available in this matter, that should the Defendants be found liable for damages, the *quantum* has been sufficiently established. Further, that it is beyond dispute that the Plaintiff

was the owner of the vehicle as described in the original and amended particulars of claim, causing the contested application for amendment of the particulars to succeed.

[21] Should the vehicle indeed have defective title in that there might have been a reasonable suspicion about the engine and chassis numbers, it does not detract from the Plaintiffs claim to ownership. It certainly cannot be found on any measure the vehicle is a stolen one and that it should therefore disentitle the Plaintiff to a claim for damages in respect of the Toyota Venture that forms the subject matter of the litigation.

[22] The police were lawfully entitled to impound the vehicle for purposes of investigating a suspicion that all was not well in so far as its identifying features go, at least until the 4th June 1999. The Defendant did not prove an extention of that time limit and for that matter, the Plaintiff did not obtain an order to release it to him before it was destroyed in a fire on the 24th August 1999.

[23] The evidence and papers filed of record indicate that the Plaintiff embarked on a process through his attorneys to secure the release of the vehicle to him, a process that would have eventually culminated in court proceedings to seek an order to release it to him, had it not been for the unfortunate fire that destroyed a large number of vehicles in the police impound at the

Lobamba Police Station.

[24] Having found that the Plaintiff established both ownership and *quantum* of damages on a balance of probabilities, I now turn to deal with the issue of liability by the Defendants, moreso of the first Defendant since the second Defendant is only cited as per the dictates of statute and it is not averred that the Attorney General had any cause in damages.

[25] It is common cause that the police detained the Plaintiffs vehicle against his wishes and will. For purposes of this judgment, it is immaterial whether they still had a lawful order of court to have the vehicle in their possession at the time of the incident. It was neither pleaded nor argued that there exists a statutory provision which relieves the police of being held liable for damages resulting from a fire which destroys a vehicle held by them on strength of a court order, past or present. It also was not argued that they do not have a duty of care, absolving the police of damages such as at hand, even if it caused by *vis major* or an act of God, such as a fire that ran out of control and encroached on police premises.

[26] The facts of the matter can be briefly summarised as follows, and from the onset it should be noted that it cannot be said that the police had anything to do with the manner in which the fire initially started.

[27] Following the impounding of the Plaintiffs vehicle, it was kept at the premises of the Royal Swazi Police at Lobamba. Near the charge office, a fenced-in camp was used to store a large number of motor vehicles. In anticipation that a fire might spread into the impound from the grass veld around it, the police were prudent enough to maintain a cleared area around it, in the form of a dirt road like ribbon which was cleared from time to time with a tractor.

The inside of the area sprouted grass, which was periodically trimmed down and generally kept short. Furthermore, it is also common cause that the "firebreak" around the camp was not very wide, and certainly not wide enough to prevent fire from jumping across the gap when circumstances so allowed.

The evidence before court is that at the relevant time, the grass at the fence itself was entwined into the fence to allow combustible material in the form of dry grass at the fence itself to remain. Also, and significantly so, there was a large avocado tree close by, spanning the gap of the firebreak in the form of dry tree leaves that formed a combustible path across the firebreak, although the tree itself was rooted on the outer perimeter of the cleared area around the camp.

[30] The evidence of eye witnesses is that a fire broke out in the surrounding dry grass area in the near vicinity during the day before the incident, that it was extinguished, but re-ignited the following day.

[31] Flames flared up and the Police Officers on duty, assisted by other off-duty officers, lost a valiant battle against the spreading fire. No fire engine could be brought in timeously as the close by fire fighting unit was elsewhere, combating another fire. Other fire stations were called but could not come to the rescue in time.

[32] As result of strong winds, the dry leaves of the avocado tree provided a path for the fire to bridge the gap across the firebreak and the impound itself then was set alight. With fuelled motor vehicles and dry grass underneath the vehicles, the end result was a devastation of magnitude. Many vehicles caught fire and so did the Toyota Venture of the Plaintiff. It was reduced to a valueless wreck.

[33] The evidence of the Police Officers is not to the effect that the preventative measures were secure enough to prevent a fire from spreading into the impound. This is borne out by the uncontroverted factual result.

[34] Yes, measures were taken to prevent such a

disaster but no, the measures were obviously not adequate enough.

[35] The remaining question is whether the police had a duty of care in respect of the vehicles to prevent harm from coming over them. From an analysis of the evidence, it seems to me that the police did regard it to be so -security patrols were held to prevent thieves from stripping parts off the vehicles. More telling is that they actively wanted to prevent a fire from entering the yard, by cutting the grass inside the fence and to maintain a cleared area around it on the outside.

[36] All of these measures collectively indicate an awareness by the Police, commendably so, of the hazard of fire. The Police were aware of the natural phenomenon of fire, that it spreads "like fire" from surrounding areas into adjacent areas. Obviously the Police were also aware that the Fire and Emergency Services (the fire brigade) has a depot right across the access road to the Lobamba Police Station, providing a measure of comfort for the time their services could one day be needed. When the day came, they were not there but fighting another fire elsewhere.

[37] From the evidence, there is no mention of any fire combating equipment at the impound, whatsoever. No fire extinguishers, no water hoses, no shovels, no fire beaters with which an

encroaching fire could be tamed. The previous day, a fire approached the area but apparently it was put out. There is no evidence that indicate towards an inspection of the area to ensure that it was completely extinguished. As it turned out, it rekindled overnight and continued to spread on the fateful day, with disastrous consequences.

[38] The basic legal principle that applies in matters like the present is whether reasonable care was taken to prevent loss and harm to the property under police custody. In older language, one would ask whether a *diligens paterfamilias* would have acted in the same manner or whether he would have taken more steps to safeguard the property under his control. From the facts at hand, I hold the strong view that more should have been done to prevent the damage.

[39] In INTERNATIONAL SHIPPING CO (PTY) LTD v BENTLEY 1990(1) SA 680 (AD) at 700 E - I, Corbett CJ with concurrence of the full bench, had cause to consider liability for damages and succinctly set out the legal position pertaining to factual causation and legal liability. The Court held:

" *As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiffs loss. This has been referred to as factual causation*'. *The enquiry as to factual causation is generally conducted by applying the so-called* '*butfor*' *test, which is designed to determine whether a postulated cause can be identified as a* causa sine qua non *of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiffs loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss;* aliter, *if it would not so have ensued. If the wrongful act is shown in this way not to be a* causa sine qua non *of the loss it does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called*

'*legal causation*'*".*

[40] Further guidance on the principles of liability in a matter like the present comes from the same Court in NGUBANE v SOUTH AFRICAN TRANSPORT SERVICES 1991(1) SA 756(AD) at 776 E - F where Kumleben JA (again unanimous) set out a useful guideline of the summary of principles of delictual liability as follows: -

> "*Liability in delict based on negligence is proved if:*
>
> *(a) a* diligens paterfamilias *in the position of the defendant -*
>
> > *(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
> >
> > *(ii) would take reasonable steps to guard against such occurrence; and*
>
> *(b)the defendant failed to take such steps. This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a* diligens paterfamilias *in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must*

> *always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases. (Kruger v Coetzee 1966(2) SA 428(A) at 430 E-G)"*

[41] In similar vein, Ogilvie Thompson CJ again considered numerous authorities on delictual liability, this time with regard to the consequences of a veld fire that spread onto a neighbouring property much as in the matter at hand, in MINISTER OF FORESTRY v QUATHLAMBA (PTY) LTD 1973(3) SA 69(AD) at 81 B - D:

> *"Equally well established, however, is the principle which, in a familiar passage, was expressed by Innes CJ, Cape Town Municipality v Paine, 1923 A.D. 207 at pp. 216-217 as follows:*
>
> > *'Every man has a right not to be injured in his person or property by the negligence of another - and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have*

> *been foreseen and guarded against by the* diligens paterfamilias, *the duty to take care is established, and it only remains to ascertain whether it has been discharged.*'
>
> *The basic and dominant principle contained in the above statement must of course be read subject to the qualification appearing later on p. 217 of the report, that*
>
> > '*mere omission did not in the* Lex Aquilia constitute culpa; *it only did so when connected with prior conduct*'"

[42] Applied to the present matter, these well settled legal principles support the inevitable finding of liability by the Respondents, as adumbrated above.

[43] The Police did foresee that fire could endanger the property under their care and they did take some preventative measures to prevent fire from setting the vehicles alight, but their actions did not conform to what reasonably was expected to be done by a diligent and care-minded impounder of motor vehicles.

[44] The impound camp was situated within an area surrounded by dry grass. A narrow strip, cleared occasionally was the ineffective cautionary measure taken to prevent fire from spreading to the inner enclosure. A large avocado

tree on the outer perimeter of the clearing was left in place, providing a bridge for fire to cross the cleared area. Inside the fence a large number of vehicles were parked, fuel tanks at the ready to provide just what fire needs to rage into inferno.

[45] The prevailing winds fanned the flames beyond any measure of control by the handful of police officers, hampered by the absence of a fire engine or equipment to subdue the encroaching flames. By all counts, it is impossible to conclude anything else than that the few precautionary measures fell far short of the reasonable measures a diligent caretaker of impounded vehicles was expected to do.

[46] In my considered view, a reasonable man would have foreseen that a fire could far too easily spread from outside the carpark to the inside and cause untold damage to impounded motor vehicles. In that particular situation at Lobamba, the Police should have governed their conduct otherwise and have set in place effective measures to prevent harm, to guard against it. They had a duty of care to do so. They did not even have fire extinguishers or a water hose at hand, seemingly placing their trust in the hope that no fire would come their way and if it did, to call the fire brigade for help.

[47] Applying the "but for" or *sine qua non* test, it

is obvious that were it not for the lack of effective preventative measures, the fire might well have been contained and limited to the outside of the impound. Situated where it was, the impound was a disaster waiting to happen, unless reasonable measures were taken to prevent it, which as it happened, proved to fail the test.

[48] It is for the aforestated reasons that the third decisive aspect of this litigation also has to be found to have been sufficiently established. Accordingly, it is held that the Plaintiff proved ownership of the vehicle, with a reasonable and uncontroverted value of E65 000 at the time of the incident, and that the 1st Defendant, vis-a-vis his agents, has to bear liability for the damage to Plaintiffs property.

[49] Wherefore it is ordered that the Defendants be liable to pay an amount of E65 000 to the Plaintiff with *mora* interest at the claimed rate of 9% *per annum* as from the date of this judgment, plus costs of suit.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE