



# **IN THE HIGH COURT OF SWAZILAND**

Civ. Case No. 2446/95

In the matter between:

ESTHER NKAMBULE

Applicant

and

SIBONGILE MASINGA

Respondent

CORAM:

S.W. Sapire A.J.

FOR APPLICANT

Miss Gwiji

FOR RESPONDENT

Mr. B. Simelane

## Judgment

(23/11/95)

This is an application brought as a matter of urgency where a rule nisi was granted on 25/10/95 calling upon the respondent to show cause on the 3/11/95 why (a) the respondent should not be ordered to transfer possession of a Mazda LDV bearing registration number SD 946 XM to the applicant. (b) The respondent should not pay the costs of the application. It was further ordered that pending the outcome of the application, the respondent would be interdicted and restrained from any manner whatsoever alienating or disposing of the motor vehicle.

Directions for service of the order were provided for and the order was serving in terms thereon. This is the extended return day of such order.

In support of her application, the applicant alleged that she was an adult widower of Mahwalala Zone 5, Mbabane. Clearly she meant a widow. The respondent was alleged to be an adult major spinster. The

applicant claims that she was married to Albert Msuthu Nkambule by civil rites on the 9th April, 1976 at Mbabane and has produced a marriage certificate from which it would appear that the marriage was entered into without an antenuptual contract. The marriage accordingly was in community of property.

The applicant's husband died on the 3rd September 1995 after a short illness.

The applicant alleges that during his lifetime, the deceased had an extramarital affair with the respondent who is personally known to the applicant.

It seems that during March 1994, the deceased purchased a motor vehicle namely a Mazda LDV registration number SD 946 XM from City Motors in Mbabane. The purchase price was E14,000.00 and the deceased paid for it on the 30th March 1994. According to the allegations in the founding affidavit, the motor vehicle in question had earlier been sold to one Alex Matsebula of Manzini from whom it was repossessed by City Motors who then sold it to the deceased.

The deceased had never caused registration of ownership of the car to be changed into his name and it is still registered in the name of Matsebula. The applicant alleges the respondent is presently in possession of the motor vehicle and despite demand by the applicant, the respondent has refused to return the vehicle to the applicant. The applicant claims to require the vehicle to be released for the purposes of the administration of her late husband's estate.

The applicant has also filed supporting affidavits which generally are intended to corroborate her allegations that the motor vehicle in question is the property of the deceased.

The respondent has filed an affidavit in which notice is given that certain matters would be raised in limine. The first of these is that the applicant has no locus standi to make the application as she has not even alleged that she is the executor in the estate. The respondent also deals with the merits and suffice it to say that she

claims ownership of the vehicle in question. On the merits there is clearly a conflict of fact which could not be resolved without recourse to the hearing of oral evidence. This however will not be necessary as I have come to the conclusion that the point in limine raised by the respondent disposes of the application.

The founding affidavit does not disclose whether an executor has been appointed to administer the Estate of the deceased or not nor is any mention named of any curator having been appointed as contemplated in the act to preserve the assets of the estate pending the appointment of an executor. It is only the executor or such curator who would have locus standi to recover property of the deceased.

I was referred to Section 19 of the Estates Act 28 of 1902 by counsel for the applicant as giving the applicant authority and to bestow upon her locus standi to make the present application. The section to which I was referred provides under the heading "Possession by survivor of estate in community of property" and reads:

"When one of two spouses who have been married in community of property dies; the joint estate shall remain under the charge of the survivor, until the executor of the deceased, or the tutor testamentary or dative of the minor children of the marriage, or the Master or curator bonis, lawfully appointed to such minor children, takes proceedings for the administration, distribution and final settlement of the said joint estate:"

The founding affidavit does not say whether an executor or other officer has been appointed as contemplated in paragraph 19, nor for that matter does it state that such an officer has not been appointed. No basis for the applicability of the section is therefore laid.

Moreover the motor vehicle in question has never been in possession of the applicant. It is difficult therefore to see how that part of the joint estate could remain under her charge. The section does not give the applicant the power as a non owner or even has the surviving partner in a marriage in community of property the right to institute an action to recover property the ownership of which is disputed.

In the circumstances the rule nisi will be discharged and the application is dismissed with costs.

S.W.   
ACTING JUDGE