IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 3007/96

In the matter between:

Dorbyl Vehicle Trading & Co. (Pty) Ltd Plaintiff

vs

Leonard Vusi Dlamini Defendant

CORAM: S.W. SAPIRE, ACJ

JUDGMENT

(17/12/96)

This is an application brought as a matter of urgency by the applicant in which it seeks the following relief:

1. It claims the usual dispensation with the forms of service prescribed by the Rules of this Court and an order directing that the matter be dealt with as one of urgency. The matter was originally enrolled on the 6th of December and has been postponed from time to time during which the parties have filed voluminous affidavits. When the matter was heard eventually, the respondent's attorney Mr. Simelane, had reserved the right to argue that the matter should not be heard at all as one of urgency.
2. The applicant sought a rule nisi calling upon the Respondent to show cause at a time to be directed by the court, why an Order should not be made in the following terms:-

2.1 Declaring the Instalment Sale Agreements marked annexures "B" and "C" respectively to the Applicant's Founding Affidavit, to be cancelled;

2.2 Directing that the Respondent deliver to the Applicant two vehicles namely;

2.2.1 A 1992 Model Mercedes Benz 1624/60 Passenger Bus, bearing Engine Number SBO1078SA023216v and Chassis Number 39704726016856; and

2.2.2 A 1989 model Mercedes Benz 071624/60 Passenger Bus bearing Engine Number SB01078SA017713s and Chassis Number 39704726007522.

2.3 That failing return of the busses to the applicant forthwith, the Sheriff or his deputy be authorised and directed to take possession of the busses wherever the same may be found and deliver the same to the applicant;.

2.4 Directing the Respondent to make payment to the applicant of an amount of R134 739.57 together with interest thereon at the rate of 15.5%
per annum calculated from the 1st day of December 1996 to date of payment.

2.5 That the Respondent pay the costs of the application on the scale as between Attorney and client or alternatively, directing that the costs of the Application be costs in the course to be instituted for the

determination of relief set out in 2.1, 2.2., 2.3 and 2.4 above.

2.6 Alternatively, pending the outcome of this application or the proceedings to be instituted for the determination of the relief set out in 2.1 to 2.5 above, the Sheriff or his Deputy attach and remove the busses whenever the same may be found and deliver them to the applicant to be held in safe custody, or alternatively to be held by the Sheriff under attachment.

3. Pending the return day the Order in terms of 2.2 and 2.3 above was to operate as an Interim Order with immediate effect.

This is a cumbersome and misleading way of seeking relief and most confusing to the respondent who is served with a notice of motion in those terms. The grant of a rule should generally take place only where application is made ex parte, because service cannot be effected or where service would frustrate the relief sought. If interim relief is sought it should be sought as such and not as a rule operating as an interim interdict.

There is a difficulty in the Plaintiffs claim. Paragraph 2.4 of the Order requires the respondent to show cause why he should not make payment to the applicant in the amount of R134,739.57 together with interest thereon. The agreements on which applicant relies, provide as is alleged by the applicant in paragraph 7.4.4 of the founding affidavit, that, in the event of the respondent defaulting in the punctual payment of the instalments or any other amounts due in terms of the agreements or failing to observe or perform any of the terms, conditions and/or obligations, the applicant would then be entitled without prejudice to any other rights, to claim immediate payment of all amounts payable in terms of the agreements irrespective of whether or not such amounts were then due, or immediately terminate the agreements, take possession of the busses, retain all payments already made by the respondent and to claim as liquidated damages payment of the difference between the balance outstanding and the value of the busses.

In this case the papers make it clear that the applicant has elected to cancel the agreement. Indeed it seeks confirmation of such cancellation. Prima facie the cancellation is valid. The applicant cannot however at the same time claim the balance owing in terms of the agreements.

The agreement itself, as the applicant alleges, provides to the contrary. The forms of relief are strictly alternative. The relief sought in paragraph 2.4, as presently advised, is incompetent.

This however does not really touch on the merits at the present stage of the application, where the form of interim relief, if any, which is to be granted to the applicant as in issue.. Applicant's arguments that the busses are its only security for the amounts claimed are however misconceived.

The applicant's founding affidavit sets out that the parties entered into two separate agreements for the sale by the applicant to the respondent of the two busses. The applicant alleges in paragraph 10 that in respect of the agreement Annexure "B" R99 348,57 has not been paid, while in respect of Annexure "C" the amount is R35 391.00. The total arrears under the two agreements is R134 739.57.

Details of these arrears are specified in Annexures "D" and "E". The agreed period or duration of the agreements had already been completed when the present action was taken. The purchase price should have been paid before now and had the respondent complied with his obligations ownership of the vehicles would have passed to him.

It is alleged by the respondent that substantial arrears have not been paid which are overdue for payment.

The respondent has remained in possession of the two busses and has strenuously opposed the granting of any relief which would remove the busses from his possession pending the determination of the applications.

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In defending the application the respondent has to a large extent based his defence on an allegation that there are no arrears at all and that all amounts due under the agreements have been paid.

The onus of establishing this, is, of course, on the respondent.

The respondent has argued that as early as April this year the question of the alleged arrears was placed in dispute. In the respondent's replying affidavit he refers to a letter dated the 16th of April 1996. In this letter, written by his attorney, the respondent denies that he is in arrear in respect of the two agreements and in the words of his attorney.

"Our client has perused your reconciliation statement and has found you do not have the following as payments made by client"

He then lists six cheques three of them each of the amount of R32 301.90, two cheques of R27 000.00 and one cheque of R5 000. The letter states that the respondent's bank statement shows that these cheques were honoured and the letter goes on to allege that the client has further made payment of R10 000.00 and R5 000.00 respectively on many occasions as a sign of good faith. The letter says that the monthly instalment is R17 521 and that in turn he is instructed that he is being called upon to pay R25 000.00 each month. It is alleged in the letter that there is no basis that the client should pay more than the agreed monthly instalment as it is clear that he is not in arrears.

The rest of the letter is argumentative and raises the question of a further instalment sale agreement relating to a bus which had been lost by fire in 1994. It is said that "our client todate is not aware if the Insurance paid for that bus and how much was paid by the Insurance". This is in conflict with what Mr. Simelane said in Court to the effect that he knew what had been paid and that it was over R300 000.00.

Other matters raised in that letter are of little consequence to this application.

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The respondent's affidavit continues to allege that the applicant has been dragging his feet and for this reason the Court should have no sympathy with the applicant who himself has brought about the alleged urgency. If it is true that the respondent is in arrears to the extent alleged with his payments, and if it is true as I have no reason to believe otherwise, the respondent has been granted considerable leniency in this matter it hardly lies within the respondent's mouth to complain that the matter has been brought now as a matter of urgency.

Whether or not the respondent is in arrears can be determined on the affidavits which have been filed.

Curiously the respondent has not referred to the applicant's reply to his Attorney's letter. A copy of such reply is attached to the answering affidavit filed by the applicant. In such letter all the respondent's allegations were dealt with it was demonstrated that the respondent's complaints and queries were unfounded. The respondent's queries have been pointedly and particularly answered. It

is clear that those payments which the respondent claims have not been credited have indeed been so credited.

Applicant has established a strong case that it was entitled to cancel the agreement and to return of the two busses. Were it not for the clumsy way in which the relief is sought I would have been inclined to grant an outright order at this stage for the return of the busses. Having regard to the form of relief sought it is necessary for me to postpone the application to a date sometime in the new term when the other relief claimed can be considered.

What does remain as an issue is whether or not an interim attachment order should issue or not. I am guided in the decision of this question by judgments in the Republic of South Africa. There is a recent judgment to which applicant's Counsel referred me. It is the case of Dorbyl Vehicle Trading and Finance Co. Ltd v Klopper 1996 (2) SA 237.

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This judgment is strongly persuasive as to how this matter should be decided. Interim relief similar to that sought in this case was there granted. In granting the relief Hurt J referred to the dictum of Holmes J in the case of Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 D.

In this case it was indicated that the Court must consider the applicant's prospects of success against the degree of prejudice to either party . The stronger the applicant's case the less of a prepondence of convenience must lie in his favour. The converse of course also applies. In the present case as in the case before Hurt J the applicant's case is indeed a strong one. The applicant has strong chances of succeeding in his claim for the return of the busses. Regard must also be heard to what was said by Greenberg J in Morrison v African Guarantee and Indemnity Co. Ltd. 1936(1) PH M35 T and quoted by Milliy J at page 90 of the report in Loader v De Beer 1947 (1) SA 87 W. I have abstracted the whole quotation:

"If lam right in the conclusion that the respondent's claim and his right is to a delivery of the motor car, then whatever he has to do with the motor car afterwards he is entitled to a delivery, and he is entitled to a delivery in the condition on the day in which he seeks to enforce his claim for delivery; he is entitled to have the article kept in the same condition in which it is on that day, and a refusal to grant him relief which would ensure this condition would cause irreparable injury. It is therefore unnecessary to decide whether this is a vincicatory right or not"

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Hurt J went on to observe "of course, in the situation which has developed since the time of the decision in Loader v De Beer, the advent of financial institutions intervening, not as de jure sellers of the vehicle, but de facto financiers might have changed the aspect of irreparable harm resulting from continued possession by the instalment sale purchaser while litigation rages about the right of possession of the article. But I consider that the presumption in favour of the applicant that irreparable harm will ensue if no interim order is made nevertheless applies clearly in this case".

Similar considerations apply in the present case and I am disposed to grant interim relief. I have considered that it may be proper in exercise of my discretion to allow the respondent to avoid the attachment by giving security. After all the applicant, as I have demonstrated, is unlikely to succeed in his claim for a R134 739.57. What the applicant really seeks to be protected against is the deterioration of the vehicle during the period until his case is finally heard. What militates against giving the respondent an opportunity to provide security to avoid the attachment whatever the amount of such security may be is that the applicant is entitled to his motor vehicle and does not have to rely on subsequently suing the respondent to make good any damages which would arise from

deterioration in the condition of the vehicle over the period. There is no reason why the applicant should be put to this additional inconvenience and expense if he is prepared to limit his claim to return of the vehicle. This being so it would be illogical to allow the payment of security to avoid the attachment.

I have also taken into account the question of the balance of convenience. In this case an interim order is going to deprive the respondent of the two busses from which he makes a living. Prima facae this is a very great inconvenience and may be thought to outweigh the inconvenience to the applicant.

But this is superficial because if one looks at the cases as a whole, as the papers stand at the present there can be little doubt as to the outcome eventually in January when the matter is heard.

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That outcome is probably going to be in the absence of anything further being said or produced by the respondent, that the cancellation of the agreement will be confirmed and that the respondent will then have to return the vehicles. So what is in question is not whether he will have an unlimited right to use these two busses in the conduct of his business but whether he should be permitted to use the Applicant's busses for this period at no cost to himself while the applicant has to sit and watch the vehicles being used and possibly deteriorating through such use.

I propose making an order similar in terms to that made by Hurt J. The Order which I make then is as follows:-

1. I direct that this application in so far as final relief is sought be postponed to the 24th of January 1997.

2. The respondent is directed to deliver to the applicant the two buses referred to in paragraph 2.2.1 and 2.2.2 of the Notice of Motion. These buses are the 1992 model Mercedes Benz 1624/60 passenger bus bearing the engine number and chassis number cited therein and the 1989 model Mercedes Benz 071624/60 passenger bus bearing the engine number and chassis number stated in paragraph 2.2.2.

3. The applicant is ordered and directed to hold the vehicles in trust subject to the supervision of the Deputy Sheriff.

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4. In the event of the respondent failing to restore possession of the vehicles of either of them to the applicant within a period of 48 hours from the date of the grant of this order the Sheriff or his Deputy is authorised and directed to take possession of the vehicles wherever the same may be found and to deliver them to the applicant to be held in trust by the applicant subject to the supervision of the Deputy Sheriff.

5. The vehicles are not to be removed from Swaziland in the area of the jurisdiction of this court. All question on costs of this application are reserved for the decision of the court hearing the application in January.

S.W. SAPIRE

ACTING CHIEF JUSTIGE