

IN THE HIGH COURT OF SWAZILAND
civ. CASE NO. 1569/99 In the matter between
AFINTA MOTOR CORPORATION
And FRANK CARLOS NERVES

APPLICANT

RESPONDENT

Coram

S.B. MAPHALALA - J

For the Applicant

MR. P. DUNSEITH

For the Respondent

MR. S. MDLADLA

JUDGEMENT

(16/07/99)

Maphalala J:

The application before court came with a certificate of urgency for an order in the following terms;

1. Waiving the usual requirements of the rules of court regarding notice, service and form of applications and hearing the application as one of urgency,
2. Declaring the rental agreement entered into between the parties on or about 23rd July 1998 to be cancelled,
3. Directing and ordering the respondent to restore the following vehicle to the possession of the applicant within 48 hours, to wit.

Certain; AMC 30 Seater people mover passenger bus.

Engine No: 14 B 1469077

Chassis No: 8005513

Registration: SD 041 DN

4. Should the respondent fail to comply with paragraph 3 above, then the Sheriff or his Deputy is authorized and directed to seize and attach such vehicle and restore it to the possession of the applicant.

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5. Costs

6. In the event of this honourable court issuing a rule nisi in terms of the above prayers, alternatively postponing the application in respect of the above prayers, then the applicant prays for an interim order in the following terms:

6.1. Directing and ordering the respondent to deliver the said vehicle within 48 hours into the custody of the applicant, which shall retain the said vehicle pending final determination of the application.

6.2 Should the respondent fail to comply with paragraph 6.1. above, then the Sheriff or his Deputy is authorized and directed to seize and attach such vehicle and to deliver it into the custody of the applicant, which shall retain the said vehicle pending the final determination of the application.

7. Further or alternative relief.

The urgent application came before court on the 20th June 1999 where an order was recorded in the following terms:

1. Deputy Sheriff for the District of Hhohho is hereby authorized to attach and keep in his custody the vehicle described in prayer 3, pending finalization of proceedings

2. Rule issues returnable on the 2nd July 1999 calling upon respondent to show cause why the vehicle should not be returned to the applicant and costs should not be granted.

3. Applicant ordered to file action within 21 days of attachment of vehicle. Respondent to file by 5.00pm on the 20th June 1999. Applicant to reply by the 30th June 1999 by close of business and the matter postponed to contested roll for submission.

Indeed, the parties filed their papers and joined issue. The matter was called in the contested roll of the 2nd July 1999 where the court heard submissions.

The case for the applicant crispy put is as follows: On or about the 23rd July, 1999 at or near Matsapha, Swaziland the applicant and the respondent entered into a rental agreement, a copy of which is annexed to the papers marked RK2, in terms of which the applicant rented to the respondent the vehicle, the property of the applicant. The material terms of the agreement are embodied in the said annexure. The vehicle was duly delivered to the respondent, and the applicant avers in its papers that it has complied with all its obligations in terms of the rental agreement "RK2". According to the applicant the respondent has failed to make prompt and regular payments of the installment payable in terms of the rental agreement when same became due and payable and as at the 7th June 1999, he was in arrears with payments amounting to

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E32, 500-00 (thirty two thousand, five hundred emalangeni). The respondent has been appraised of this state of affairs as evidenced by a flurry of letters, viz, one dated 10th June 1999, and one dated the 18th June 1999 being annexure "RK4" and "RK5".

On the other hand the respondent in his papers raised a point in limine taking the view that the application is highly misdirected, and it has been made against him, when in fact the contract was made between F & R Panel Beaters and Spray Painters Ltd. He denies that he is trading as Frank Transport, F & R Panel Beaters and Spray

Painters Ltd is a company registered in Swaziland, according to the appropriate laws. It is fully pledged legal person to sue and be sued. On the strength of this, wherefore, The respondent applied that the application be dismissed with costs. A blue book of the said vehicle registered under the name of F & R Panel Beaters and Spray Painters Ltd was filed annexed "FN1". The long and short of respondent opposition to this application is that the respondent has been wrongly cited in this suit.

The court heard submissions on the 2nd July 1999. It is contended on behalf of the applicant as represented by Mr. Dunseith that the point in limine raised by the respondent is a question of fact and therefore cannot be said to be a point in limine. It is not a question of law. He argued that the matter should be argued on the merits. That respondent in its opposing affidavit at paragraph 9 and 10 admits the agreement between the applicant and the respondent and that the vehicle was delivered to the applicant who has been using it in conveying passengers in his transport business. Mr. Dunseith pointed out that the respondent had raised two defences, viz, that the agreement was entered into with another company and that respondent is saying the vehicle is defective and therefore he is not liable to pay the rental as per the agreement. To the latter defence Mr. Dunseith submitted that respondent has not claimed any set off (see Greenberg vs Meds Veterinary Laboratories (Pty) Ltd 1977 (2) S.A. 277 at 284 - 286.

On the other hand Mr. Mdladla for the other side took the view that the agreement/contract between the parties should be set aside because the parties were not at consensus ad idem when the contract was formed. It is not denied that the vehicle was delivered to the respondent. The blue book, viz, annexure "FN1" reflects that the owner of the vehicle is F & R Panel Beaters and Spray Painters Ltd not the respondent. He contended that if one is to prove ownership of vehicle one produces a blue book. On the second point that of the issue of defects he conceded the arguments raised by Mr. Dunseith supported by the ratio in Greenberg (supra).

The issue, therefore, which remains to be determined is whether or not a wrong party has been cited in these proceedings. The facts before me point to the direction that the respondent was properly cited. On annexure "RK2" it is common cause that the signature on the agreement is that of the respondent. If he were acting as agent for this F & R Panel Beaters and Spray painters Ltd the law is clear and it is trite that an agent who does not disclose his principal is personally liable. Further annexure "A" gives respondent's personal details and there is no mention at all that he was contracting on behalf of the company. Furthermore, registration of the vehicle to the Central Registry is no evidence of ownership it is merely an administrative act. To support this view recourse can be sought from the ratio in a judgment of this court by Sapire CJ in the case of A.L. Mizan Traders (Pty) Ltd vs Swazi Bus Service Civil

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Case No. 736/97 (unreported) where the learned Chief Justice on a similar question had this to say:

"Unlike in the case of immovable property registration as licensee or owner of a motor vehicle is not proof of ownership. This case itself is an example where a purchaser on hire purchase of a motor vehicle may appear as the registered owner without in fact and in law being the owner".

In my view nothing much turns on the blue book. The facts before me are adequate for me to conclude that the applicant contracted with the respondent for the rental of this bus. The respondent is therefore, contractually bound by the obligations which flow from this agreement. At all material times the applicant has been dealing with the respondent under the terms of the agreement.

Coming to the second point raised, for what it is worth as Mr. Mdladla for the respondent conceded the submissions raised by Mr. Dunseith in this regard. As per Greenberg (supra) when a tenant, on being sued for rent, avers that he has been deprived of the beneficial occupation of the leased premises by reason of structural defects which the landlord fails to repair, he cannot remain in occupation, thereby keeping the lease alive, and refuse to pay the rent. This case is at all fours with the instant case.

In the result, for the foregoing reasons I confirm the *rale nisi* issued by this court on the 25th June 1999 with costs.

S. B. MAPHALALA

JUDGE