IN TH1 HIGH COURT OF SWAZILAND

CIV. CASE NO. 1409/99

In the matter between

BRYAN MORTON WHEATLEY	APPLICANT
And RUDOLF STEENKAMP	RESPONDENT
Coram	S.B. MAPHALALA – J
For the Applicant	MR. SIMELANE
For the Respondent	MR. MABILA

JUDGEMENT

(25/06/99)

Maphalala J:

The matter came by notice of motion with a certificate of urgency for an order in the following terms:

1. That the rules of court, as regards service, forms and time limits, be dispensed with and the matter heard as one of urgency;
2. That the respondent be directed to restore possession of the motor vehicle more fully described in paragraph 3 of the applicant's founding affidavit.

2.1. Alternatively, that a rule nisi issue operating with immediate effect, calling upon the respondent to show cause on a date to

be set by the court, why an order as stated in 2 above should not be made final.

3. That the respondent be ordered to pay the costs of this application.

4. Further and/or alternative relief.

The application is supported by the founding affidavit of the applicant with various pertinent annexures.

The respondent filed a notice of intention to oppose and subsequently filed an answering affidavit deposed by the respondent.

This is essentially an application for rei vindicatio. The history of the matter is that the applicant sent the motor vehicle, which is the subject matter of this application for repairs to the respondent who is a mechanic. It appears from the facts gleaned from the papers before court that applicant had used the services of the respondent on prior occasions. However, on the 11th May 1999 he took the motor vehicle to the respondent for repairs and he paid him in full. When he took the motor vehicle back as he was driving it from respondent's place he heard some screeching sound coming from the gear box area. As he reversed the motor vehicle at respondent's place and respondent was guiding him backwards he hit respondent's vehicle an Audi, at the rear, causing slight damage to the boot area. He advised the respondent that there was 100% failure of brakes. Applicant used the motor vehicle to travel to Carolina and returned the same day. On the 17th May, 1999 he took the motor vehicle back to the respondent to attend to the noise emanating from the gearbox. The motor vehicle had to be taken to a specialist. Applicant when he came a later date he found the motor vehicle secured with a very big padlock and chained to a big tree hence he could not take it. The fuel tank was also empty.

Applicant was told by the respondent that he would not get his motor vehicle back until he had compensated them for the damage occasioned on the respondent's Audi as a result of the collision. He informed respondent that he was not responsible for the negligence. That notwithstanding, the respondent has refused to release his motor

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vehicle and continues to hold unto it illegally. That the respondent cannot be said to be exercising the right of lieu over the motor vehicle since he had paid respondent in full for the initial service done to the motor vehicle.

The respondent in his papers admit all the averments made by the applicant in his founding affidavit. The only point of divergence is that applicant alleges at paragraph 14 of his answering affidavit that he wished that the applicant has all along been liaising with his father (Gerrit) as he was in South Africa where he resided and employed.

When the matter came for arguments on the 21st June 1999, Mr. Mabila informed the court that respondent is no longer pursuing points in limine in his answering affidavit. The matter then proceeded to be argued on the merits.

Mr. Simelane submitted that the applicant has sufficiently established a case for rei vindicatio. He directed the court's attention to a number of paragraphs in the various affidavits filed to support the applicant's case. On a point of law the court was referred to the case of Hefer vs Van Greuning 1979 (4) S.A. 953 to the proposition that an owner is competent, by reason of his right of ownership, under the rei vindicatio to demand his property from anyone who cannot invoke a right against the owner to keep the property. Mr. Simelane further submitted before court that applicant all along has been dealing with respondent as his mechanic in respect of this motor vehicle. Now applicant is raising up his hands saying that he is not responsible. Mr. Simelane further suggested that an order be granted to the effect that whosoever is in possession of the motor vehicle to surrender same to the applicant.

Mr. Mabila for the other side agreed with the legal principles used by Mr. Simelane to advance his client's case. His only gripe is that the motor vehicle is not under the respondent's control but is in his father's yard. Respondent is not a party to this suit and should not have been cited. They, therefore should not be made to pay costs as they were dragged into this litigation. Further that he does not have any problem with the order sought by Mr. Simelane.

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These are the issues for determination. The court finds that the applicant had made a case for rei vindicatio against the respondent on the basis of the facts presented and the submissions made by counsel. The facts are clear even from respondent's papers that he was the one who was dealing with the applicant in respect of the motor vehicle at the material time. The respondent cannot now wash his hands and say that he is not involved in this litigation.

As an aside the issue of the alleged negligence by the applicant cannot be used to hold applicant's motor vehicle. The respondent can pursue that aspect in a proper action

In the result, I rule as follows:

a) Whoever, is in possession/control of the motor vehicle which is the subject matter of this suit is to surrender it forthwith to the applicant.
b) Respondent to pay costs of the suit.

S. B MAPHALALA

JUDGE