IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO 2050/99

In the matter between

DAVID M. DLAMINI	**APPLICANT**
And	
XOLANI SHONGWE	**RESPONDENT**
Coram	S.B. MAPHALALA – J
For Applicant	MR. MABILA
For Respondent	MR. J. HENWOOD

JUDGEMENT
(03/02/00)

Maphalala J:

This matter came with a certificate of urgency for an order framed in the following manner:

1. The forms and service provided for in the rules of this court to be dispensed with and the matter be dealt with as a matter of urgency in terms of Rule 6 (25) (a);

2. That a rule nisi do hereby issue, calling upon the respondent to show cause on a date to be fixed by the court why:

2.1.1. The respondent or any other person who may be found to be in possession of the vehicle which is a:

1995 Honda Ballade Luxline SD 180 BG

Should not be ordered to restore the vehicle to the applicant.

2.2. That the respondent should not be made to pay the costs of this application.

3. That the rule in paragraph 2 above operates with interim and immediate effect pending the return date of this application.

4. That the Deputy Sheriff for the District in which the vehicle is to be found and is hereby authorised to take whatever steps he deem necessary to carry into effect order no. 2 above

5. Further and/or alternative relief.

A rule nisi was issued by the learned Chief Justice on the 20th August 1999, which reads ***ipsissima*** verba thus:

> "Wherefore having heard counsel for the applicant it is hereby ordered that:
>
> 1. The Sheriff or his lawful Deputy is authorised and requested to attach the motor vehicle, a 1995 Honda Ballade 1601 registered SD 180 BG, in the possession of the respondent and to hold the same pending the outcome of this application.
>
> 2. The application is postponed to the 27th August 1999, when the applicant's claim for vindication of the vehicle will be heard.
>
> 3. Respondent may file affidavit not later than 25th August 1999, at 12.00 noon if he wishes to oppose this ruling
>
> 4. This order and founding papers are to be served on the respondent simultaneously with the making of attachment in (1) above.
>
> 5. Costs are reserved".

Pursuant to this order respondent filed an opposing affidavit with annexure joining issue with the applicant. In turn the applicant filed his replying affidavit.

The history of the matter briefly put is as follows:

The applicant who is the registered owner of the motor vehicle in question entered into a written sale agreement with Car Mart (Pty) Ltd on the 7th June 1999, and Car Mart (Pty) Ltd was at all material times represented by one Nathan Blumenthal. The material terms of the agreement were that Car Mart undertook to sell the vehicle on his behalf for the sum of E35, 000- 00, Car Mart would find a purchaser for the vehicle and upon such sale Car mart would be entitled to charge a 10% commission on the purchase price. The said motor vehicle was duly delivered to Car mart in accordance with the agreement. According to the applicant since the 8th June 1999, he has seen the vehicle around Manzini by someone unknown to him who is employed by the respondent. On further investigation he found out that Xolani Shongwe is the respondent herein was the owner of the motor vehicle. He tried to get hold of Nathan Blumenthal but was told that he was out of the country. Applicant is of the reasonable belief that Nathan Blumenthal acting for and on behalf of Car mart had sold the motor vehicle to the respondent but he has not received any payment in terms of their agreement. In the circumstances, Car mart has repudiated. In any event due notice of cancellation was also given to Car mart in terms of the agreement.

The other side of the coin as gleaned from the respondent's answering affidavit is as follows:

The respondent bought the said motor vehicle from Car mart at an agreed purchase price of E50, 000 – 00 the said agreement embodied in annexure X52 attached to the respondent's papers. In that regard respondent paid a cash deposit of E35, 000 –00 and in addition to that traded his motor vehicle being a Honda Ballade bearing registration number SD 862 XM for which he was given value of E3, 000 – 00, which was used to reduce his indebtedness to the applicant to the sum of E12, 000 – 00. It was further a term of the agreement that he would settle the balance in instalments of E1, 500-00 per month. The said motor vehicle was duly delivered to him.

Respondent in his opposing papers point out that according to the terms of the standard conditions of consignment sale agreement, the applicant can only terminate on forty eight (48) hour notice, in terms of Clause 7 of the agreement. Furthermore, Clause 9 of the said agreement contains a non-variation clause in terms of which the applicant would have to give notice of cancellation in writing. That it is noteworthy that no such written cancellation is annexed to the applicant's founding affidavit. Respondent maintains that although the vehicle still belongs to the applicant until he had paid for it in full, he is in legal possession of the vehicle, having acquired such possession from the applicant's duly authorised agent.

It appears from the papers that negotiations between the parties were conducted at divers times though no solution was found hence the presence suit.

The matter came on the contested roll of the 22nd October 1999, where the court heard submissions and reserved judgement.

The arguments advanced on behalf of the applicant are two-fold. Firstly, it was submitted that the applicant is entitled to the recovery of his motor vehicle in terms of the ***res vindicatio***. That it is a trite principle of law that an owner is entitled to recover his property from anyone who retains possession without his consent. The court was directed to the case of ***Chetty v Naidoo 1974 (3) S.A. 13 (A)*** in support of this proposition. It was argued under this point that the applicant has satisfied all the requirements for relief under the ***res vindicatio*** viz, that the applicant has proved that he is the owner of the motor vehicle and secondly, that applicant has proved that the motor vehicle is in the respondent's possession. (see ***Kleyn and Barraine Silberberg and Schoeman's Law of Property (3rd ED) page 273).*** The rêspondent has no right to retain possession of the motor vehicle. The applicant has shown in his papers that he terminated his agreement with Car Mart. That consequent to the said termination any right which the respondent might have had to the motor vehicle was as a logical consequence, extinguished.

The second leg of the applicant's case is based on the contention that the respondent acquired possession of the motor vehicle wrongfully. Car Mart who at all material times hereto the authorised agent of the applicant acted ***ultra vires*** its scope in negotiating and concluding a sale, which it was not authorised to do. The legal submission here is that a principal cannot be bound by the acts of his agent, which were beyond the agent's authority (see ***Willie's Principles of South African law (8th ED) page 592, Gibson – South African Merchantile and Company Law (7th ED) page 206).*** That in the instant case the applicant has not ratified any of the agent's (Car mart) unauthorised actions. An act which is done ***ultra vires*** by an agent can only be of force and effect only when the principal has ratified it (see ***Collen v Rietfontein Engineering Works 1948 (1) S.A. 413 (A)).***

On the other hand it was argued on behalf of the respondent by Mr. Henwood that the applicant appointed Car Mart (Pty) Ltd to ***inter alia*** sell his motor vehicle on his behalf for the sum of E35, 000 – 00 in terms of the consignment sale agreement. It was a specific term of the consignment sale agreement that any profit or consideration in excess of E35, 000 – 00 was remuneration to Car Mart. As agent Car Mart (Pty) Ltd bound the applicant as principal to the agreement with the respondent. It was argued that the applicant has failed to show that he terminated the agency agreement

by giving 48 hours written notice in terms of Clause 8 of the agreement. The applicant's agent did not act ***ultra vires*** or without due authority in that he carried out his mandate fully and properly but failed to account to the applicant as principal for the funds he received. The sum of E35, 000 – 00 was paid by the respondents to the applicant's agent therefore in so far as the applicant is concerned the required funds were received by his agent as required in terms of the agency agreement. Mr. Henwood went further and argued that the applicant was estopped from alleging that his agent had no authority to bind him because in concluding the instalment sale agreement with the respondent the agent was at all material times acting within the scope of his authority in that he realised the sum of E35, 000 – 00 cash required by the applicant and sought to keep the balance for himself as remuneration in terms of the sale agreement. To buttress the latter assertion it was submitted on behalf of the respondent alleging that his agent acted beyond the scope of his authority by concluding an instalment sale agreement as the nature of such a sale is normal and justified by the usages of the agents trade. The court was referred to the cases of ***Nel vs S.A. Railways and Harbours 1924 AD 30*** and that of ***Kahn vs Leslie 1928 EDL 416 at 418*** to support this view. The final salvo by the respondent is that the applicant continues to accept payment of E1, 500 – 00 per month from the respondent as evidenced in annexure X53 at page 37. As a result of which he is estopped from denying the agreement. The respondent therefore is a lawful possessor of the vehicle concerned.

These then are the issues in this matter. I have perused through the papers before me and carefully considered the submissions advanced from both sides. It appears to me that the crux of the matter is to determine whether or not Car Mart (Pty) Ltd who it is common cause were acting as agents of the applicant in the sale of the motor vehicle to the respondent acted ***ultra vires*** in that they went beyond the ambit of their authority as given by the agreement. The authorities cited by Mr. Mabila for the applicant on the principle of ***res vindicatio*** are good in law but with respect, the gravamen of the issue here is whether Car Mart acted ***ultra vire*** or ***vice versa***. This in my view is the determinant factor in this dispute. For one to unravel the dispute recourse should be had to be the various agreements and pieces of correspondence in this case.

The document in this case is annexure DMD 1 at page 8 of the Book of Pleading, viz the consignment sale agreement. This is the agreement which was entered into between the applicant and Car Mart establishing the principal/agency relationship. From it flows terms and conditions by either party pertaining to the sale of the said motor vehicle, more importantly, the authority conferred to Car Mart as an agent is clearly spelt out. The pertinent potion of the agreement reads thus:

> "Consignment Sale Agreement
>
> a) I, the undersigned, do hereby grant to Car Mart subject to the terms and conditions, and those appearing overleaf (pages 2, 3, 4 and 5) the sole and exclusive.
>
> i) Right to sell on my behalf;
>
> ii) Right to purchase the vehicle schedule below for the net amount of E35, 000 – 00
>
> Any profit and/or other consideration received by Car Mart in excess of such amount to be for its own account (my emphasis)..."

The agreement is duly signed by both parties.

This portion of the agreement clearly established the scope of the agency. It is common cause or rather it has not been placed into dispute that the respondent paid a deposit of E35, 000 – 00 to Car Mart, and thus to that extent Car mart fulfilled its end of the bargain. The issue of Car Mart having entered into an instalment agreement with the respondent is neither here nor there. The very agreement permits Car Mart to procure any other profit in excess of the E35, 000 – 00. The exact wording reads:

> "Any profit and/or other consideration received by Car Mart in excess of such amount to be for its own benefit"

There is nothing ***ultra vires*** about what Car Mart did. Further there is no proof of the cancellation of this agreement or at least the court is not told the date of which such cancellation took place. The agreement at Clause 7 states:

> "7 the seller agrees that if the vehicle remains on Car mart's floor after the expiry of the period stipulated in paragraph 2 above, the terms of this agreement will continue until terminated by either party on 48 (forty eight hours) (weekends and public holidays excluded) notice in writing, during such period of notice Car Mart may nevertheless elect to purchase the vehicle".

Furthermore, it appears that the applicant ratified the agreement entered into between Car mart and the applicant when one look at annexure "C" at page 45 of the Book of Pleadings being a letter from respondent's attorney dated the 15th September 1999, addresses to applicant's attorney. The important paragraph in that letter is paragraph 2, which reads as follows:

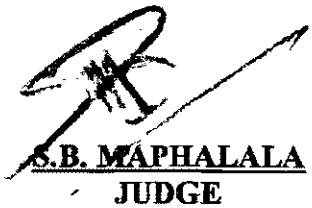
> "2 As far as we are aware, an agreement was entered into between our client and yours in terms of which our client undertook to pay the balance outstanding in instalment of E1, 500 – 00 per month".

It appears further by letter annexure "B" (page 4) of the Book of Pleading being a letter from applicant's attorney that applicant sought a deposit of E7, 000 – 00 from the respondent.

In this case it is clear that the payment of E35, 000 – 00 was paid to the agent (Car Mart). It is trite that payment to an agent releases a third party from obligation with the principal. For this proposition reliance can be had to the case of ***Rhodes Motors (Pty) Ltd vs Pringle-Wood No. 1965 (4) S.A. 40.***

In the final analysis, it appears that the agent (Car Mart) and the applicant are engaged in a dispute or that the agent has disappeared is of no concern to the respondent as he was not a party to the agreement between the applicant and his agent. He is brought into the fray yet he was a ***bona fide*** purchaser. Whatever remedy the applicant has in this matter lies with his own agent.

I thus dismiss the application with costs.



S.B. MAPHALALA
JUDGE