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THE HIGH COURT OF SWAZILAND

CIVIL CASE # 2309/01

In the matter between:

MPHEZENI VILAKATI	**Applicant**
And	
CYPRIAN GULE	**1st Respondent**
DEPUTY SHERIFF, LUBOMBO DISTRICT	**2nd Respondent**

In re:

CYPRIAN GULE	**Plaintiff**
And	
MPHEZENI VILAKATI	**Defendant**

CORAM : **MASUKU J.**

For the Applicant	: **Mr S. Bhembe**
For the 1st Respondent	: **Mr L. Howe**
For the 2nd Respondent	: **No appearance**

JUDGEMENT
10th May 2002

In this application, which was initially filed under a Certificate of Urgency, the Applicant prays for an Order in the following terms:-

(a) Dispensing with the normal forms of service and normal time limits as provided by the Rules of this Honourable Court and having this matter heard as one of urgency.

(b) Directing the 1st Respondent and 2nd Respondent to release back to Applicant the fourteen (14) herd of cattle attached by the 2nd Respondent on the 6th December 2001, forthwith on being served with an Order of Court.

© Directing 1st Respondent and 2nd Respondent to pay costs on the Attorney-Client scale jointly and severally one paying the other to be absolved.

(d) Granting Applicant any further and/or alternative relief.

The Respondents oppose the grant of the above relief and have in that regard, filed their papers. The history of this matter may be summarised as follows:- The 1st Respondent sued out a Combined Summons against the Applicant, claiming the delivery of three (3) herd of cattle, failing which, the payment of an amount of E 8 850.00, interests and costs. Judgement by default was entered against the Applicant on the 12th October 2001, whereafter the process of execution was initiated, culminating in the 2nd Respondent attaching the fourteen (14) herd of cattle referred to in the Notice of Motion above.

The Applicant thereafter filed an urgent application dated 12th December, 2001 in which it sought an Order rescinding the default judgement referred to above, interdicting the 2nd Respondent from disposing the aforesaid herd of cattle which by this time had been laid under attachment, pending finalisation of the matter; granting leave to the Applicant to defend the main claim. The matter was postponed on a few occasions thereafter.

The matter then served before the learned Chief Justice, who on the 22nd February 2002 endorsed and granted a consent Order in the following terms; -

(a) The order of the 12th October, 2001 entered in favour of 1st Respondent which was judgement by default be rescinded.

(b) The Second Respondent is interdicted and restrained from selling or disposing of the fourteen (14) herd of cattle attached on the 6th day of December 2001, pending finalisation of this matter.

The Applicant in his papers alleges that after this consent Order, there was "another understanding between my Attorney and that of the 1st Respondent that the fourteen (14) herd of cattle would revert back to me pending finalisation of the main action". He further deposes to the fact that his present attorney further told him, and this is confirmed by the Attorney's affidavit, that the 2nd Respondent had "given" the aforesaid cattle to the 1st Respondent. The Applicant reasons that the cattle belong to him and that he is, in view of the consent order, entitled to keep the same and harbours reasonable fears that the 1st Respondent is likely to dispose of the same to the Applicant's prejudice. He further alleges that it is unlawful for the 1st Respondent to hand over the cattle to an interested party in the proceedings.

The 1st Respondent's case is as follows – that there was no other understanding between the parties save the consent Order dated 22nd February, 2002 and in view of that fact, the cattle should remain with the 1st Respondent pending the finalisation of the main action. It is now common cause between the parties that after the attachment of the cattle by the 2nd Respondent, she kept the same under attachment in the 1st Respondent's farm. This is also confirmed by the Notice of Attachment filed by the 2nd Respondent dated 6th December 2001. It is accompanied by a full report of the events surrounding the said attachment.

It would appear to me that the full answer to the Applicant's claim is to be found in the Order dated 22nd February, 2002 in terms of which both parties agreed that the initial Order for default judgement be rescinded and that the 2nd Respondent be interdicted from disposing of alienating the said property whilst the action remained pending. That being the case, the Applicant cannot now demand the release of the cattle as the action is still pending and the said cattle remain under attachment by Order of Court made pursuant to an agreement of the parties.

If the Applicant is for any reason unhappy with the aforesaid consent Order, he should apply to Court for the same to varied and also advance cogent reasons therefor. I will add that the Applicant's papers are misleading in the sense that they create a misapprehension that the 2nd Respondent decided, after the setting aside rescission of the default judgement, to "give" the cattle the 1st Respondent, whereas it is common cause that the 2nd Respondent immediately after attaching the aforesaid cattle, caused the same to be removed and kept at some convenient place of security, namely, the 1st Respondent's farm.

By so doing, it does not mean that ownership of the cattle has been passed by the 2nd Respondent to the 1st Respondent as prayer (b) of the consent Order still obtains. Mr Bhembe has failed to refer the Court to any authority which precludes the Deputy Sheriff from keeping the attached property with an interested party. I say this cognisant that in terms of Rule 45 (6), the property, after being laid under attachment, may be left by the Deputy Sheriff in the premises where it was attached and inventoried and this may include the Judgement Debtor's premises. It is clear that a Judgement Debtor is an interested party in proceedings. Mr Bhembe's contention cannot in view of the foregoing stand.

There is nothing to indicate that the property is no longer under attachment and keeping the property at 2nd Respondent's farm does not *per se* demonstrate that the attachment has been lifted. The Applicant may justifiably find it unfair or even unjust for the cattle to be left in the 1st Respondent's farm but he should understand that the attachment still obtains and that there is not a whit to suggest impropriety on the 2nd Respondent's part in keeping the cattle in the said farm nor can abuse of the 2nd Respondent's discretion be inferred therefrom.

The Applicant's remedy is to apply for a variation of the said Order, in order to formally record the "understanding" or to furnish sufficient security for the amount claimed as will satisfy the 2nd Respondent. It is however clear from the papers that the first avenue will be strongly opposed by the 1st Respondent. After the success of one of the above variables may the attachment be lifted and custody of the cattle be granted to him. Nothing short of the foregoing will suffice. The parties entered a consent Order which remains effective and its terms or effect may not be altered or negated by an unrecorded and disputed "understanding" which runs contrary to the consent Order endorsed by this Court.

In view of the foregoing, the application be and is hereby dismissed with costs on the ordinary scale.

T.S. MASUKU
JUDGE