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THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.2723/02

In the matter between:

PRECISION (PTY) LIMITED	**1st Applicant**
HERBERT VILANE	**2nd Applicant**
And	
MARTIN AKKER	**1st Respondent**
AUTOMOTIVE & GENERAL MACHINE TOOL	**2nd Respondent**

CORAM : **MASUKU J.**

For Applicant : **Mr L.R. Mamba**
For respondents : **Mr B. Magagula**

JUDGEMENT
25th October 2002

This is an application filed as one of urgency and in which the following relief is sought: -

a. Dispensing with the ordinary forms and time limits for service and hearing this matter urgently.

b. Directing and ordering the first respondent to deliver to the applicant forthwith a motor described as VW Caravelle 2.5 1992 model, white in colour registration No. NV 2135.

c. Interdicting and restraining the first respondent from entering the business

premises of the first applicant for the purpose of executing any writs or serving and process not connected with the first applicant or its employees.

d. Awarding costs against the first respondent on a scale as between attorney and own client.

The matter arises from an attachment of the motor vehicle described hereinabove by the 1st Respondent in execution of a judgement in favour of the 2nd Respondent and which judgement had been granted against an entity called Embalenhle Motor (Pty) Ltd under case No.2019/02. The 2nd Applicant claims that the vehicle was unlawfully attached and belongs to him and not to Embalenhle (Pty) Ltd the judgement debtor. He therefor seeks delivery of the said Motor vehicle to him.

In opposition to the relief sought the Respondents raised the following points *in limine* and which are the subject of this judgement, namely: -

(a) The 1st Applicant's Notice of Application is fatally defective in that it does not comply with Rule 6 (10) of the Rules of Court (as amended);

(b) No circumstances explicitly rendering the matter urgent have been averred;

© Applicant has failed to prove his ownership of the motor vehicle in question;

(d) The Applicants have failed to file an interpleader notice;

(e) Whereas the Applicants claim an interdict, their papers are fatally defective because:

(i) it has not been shown whether the interdict sought is temporal or final;

(ii) the Applicant has failed to establish a clear right to the motor vehicle in order to warrant the issuance of an interdict;

(iii) the Applicants seek to interdict the 1st Respondent from carrying out his duties as an officer of the Court to execute judgements of this

Court.

(f) The 1st Applicant has filed no affidavit in support of its claim.

I interpolate to state that at the commencement of the hearing, Mr Magagula wisely decided not to pursue the issue relating to urgency, appearing as (b) above. It now behoves me to make a ruling on the above points.

(a) Non-compliance with Rule 6 (10)

Rule 6 (10) reads as follows: -

> *"In such notice, the applicant shall appoint an address within five kilometres of the office of the Registrar at which he will accept notice and service of all documents in such proceedings and shall set forth a day not less than five days after service thereof on the Respondent is required to notify the Applicant in writing whether he intends to oppose such application, and shall further state that if no such notification is given, the application will be set down for hearing on a stated day, not being less than seven days after service on the Respondent of the Notice."*

The non-compliance therewith alleged is that whereas the said sub-Rule peremptorily requires an Applicant to appoint an address within five kilometres within the seat of Registrar of this Court, no such address was furnished in respect of the 1st Applicant. The Notice of motion indicates the address of L.R. Mamba and Associates as being the address for the 2nd Applicant, there being no mention made of the 1st Applicant therein. In the Certificate of Urgency, Mr Mamba described himself as the 1st Applicant's attorney, giving the same address as that in the Notice of Motion.

Mr Mamba attributed the omission to insert the 1st Applicant to a typographical error. I accept this explanation as it is clear from the papers that Mr Mamba represented both and if there was a doubt, then the papers would have had to be served at the address furnished and to which Mr Mamba would object if it was his argument that he does not represent the Applicant concerned. In any event, I am not persuaded that the Respondents have suffered

any prejudice as a result of the omission. The point taken does not thereby under the 1st Applicant's Notice fatally defective.

It appears to be highly fastidious and an extremely formalistic point. By so saying, I do not condone the lack of clarity in Mr Mamba's papers. Court papers drawn even in the most urgent of circumstances must be carefully and conscienscious<u>ly correctly</u> drawn, admitting no room for such rudimentary issues as the address of service. Such careless and inelegantly drawn papers will draw criticism from the Court. Having said so, it is clear that Mr Mamba represents both Applicants and I will not accede therefor to adjudging the 1st Applicant's notice fatally defective. This point of law is not upheld. I should however, in considering the formalistic nature of this point to adhere to remakes in **GEORGE SOPHOCLEOUS VS SAM SOPHOCLEOUS C.V. APPEAL NO.14/2001** (unreported) where Leon J.P. stated the following regarding the Rules of Court at page 7:-

> *"Rules of Court, important as they are should not be regarded as if they are the Ten Commandments. Indeed it has been held that Rules of Court should be Interpreted so as to provide for the expeditious disposition of litigation."*

(b) Failure to allege ownership of the vehicle in question

In paragraph 4 of the founding Affidavit, the 2nd Applicant states the following; -

> *"I am the owner of a certain motor vehicle described as a VW Caravelle 2.5 1992 model, white in colour."*

At paragraph 7, he proceeds to state as follows: -

> *"The said vehicle was purchased by me in my personal capacity from a garage in Vryheid in South Africa during 2001. The registration documents of the vehicle are presently in the motor vehicle and I am unable to state the name in which the vehicle is registered."* (my emphasis)

In response to paragraph 4, the 2nd Respondents Director, who deposed to the Answering Affidavit records that the contents of that paragraph, amongst others is not in dispute. In response to paragraph 7, quoted above, the following appears:-

> *"I do not know the history of how the motor vehicle was purchased and came to be owned by Mr Vilane, what I know is that he tendered it to be attached by the Deputy Sheriff to satisfy a judgement obtained under Case No.2019/2002. The rest of the contents of this paragraph are unknown to me."*

The 1st Respondent did not respond to paragraph 4 but could neither confirm nor deny the contents of paragraph 7 because they were unknown to him. He however denied that the registration papers of the motor vehicle are inside it as alleged by the 2nd Applicant. According to the 1st Respondent, the 2nd Applicant took those documents away from the vehicle.

The main point of contention in this matter revolves around whether the motor vehicle was properly attached or surrendered as alleged. The question is not whether or not the 2nd Applicant is the owner. From the papers filed by the Respondents, there is an admission that the 2nd Applicant is the owner and this I have shown above. In any case, it is clear from the evidence that the Applicants claim of ownership is not contested and there is no other person, asserting ownership to the motor vehicle. It is in any event clear that Vilane was in possession of the vehicle before attachment. Registration of a motor vehicle in a person's name must not always be equated with ownership and is not synonymous therewith. A registered person may not be an owner of a motor vehicle. This point must in my view fail.

© Failure to file an Interpleader Notice

Interpleader Notices are governed by the provisions of Rule 58, the contents of which I do not propose to quote. Erasmus, in his work entitled "Superior Court Practice," Juta 1995 had this to say about the Interpleader at B1-399: -

> *"Interpleader is a form of procedure whereby a person in possession of property not his own (e.g. stakeholder or other custodian of property to which he lays no*

claim in his own right which is claimed from him by two or more other persons, is enabled to call upon the rival claimants to such property to appear before Court in order that the right to such property, as between the rival claimants, may be determined without putting the holder of the property to the trouble and expense of an action or actions.

In our Rule 58, to which the foregoing fully applies, reference is made to persons with "adverse claims". *In casu,* there are no persons other than the 1st Applicant who claim ownership of the property in question. It is clear that the person who issues the said Notice is the one in possession of the disputed property and in respect of which adverse claims are or likely to be made. *In casu*, the property is with the 1st Respondent and if it was necessary or prudent to issue the Notice (i.e. if there were persons with rival claims) then the 1st Respondent would, if appropriate issue the Notice. This, neither of the Applicants can do because firstly, they are not in possession of the vehicle and secondly, there are no adverse claims in respect of that motor vehicle. This point was raised as a result of a misunderstanding of the nature and purpose of an interpleader. This point is liable to fail therefor.

(d) Failure to make relevant allegation is support of interdict.

As will be seen from the Notice of Motion quoted earlier above, prayer C is for the grant of an interdict restraining the 1st Respondent from entering the 1st Applicant's premises for the purpose of executing any writs or serving process connected to the 1st Applicant or its employees.

The point taken by Mr Magagula is that in the application for an interdict, the Applicant is enjoined to indicate whether the interdict is interim or final. In this regard, he referred the Court to page 43 of Prest, "Interlocutory Interdicts", 1st Edition Juta CO.1993. On perusal of the book, I was unable to find anything in support of Mr Magagula's contention.

What is however significant is that there is no affidavit filed by either Applicant and on the basis of which the Court can grant an interdict. The 1st Applicant, in whose favour it would appear this prayer was made has filed no affidavit at all. The 2nd Applicant has also not made sufficiently relevant allegations in this regard. It is in any event doubtful whether 2nd

Applicant could lawfully file an affidavit on behalf of the 1st Applicant, a legal persona in the absence of a resolution authorising the 1st Applicant to move the application end the 2nd Applicant to depose to the affidavit.

An Applicant for an interdict, whether interlocutory or final must satisfy the Court of certain relevant requirements. The basis upon which the Court can do so is papers filed and facts alleged therein and from which the Court can after argument by the Applicant's counsel consider. This however does not mean that Counsel's argument can take the place of affidavits. The necessary allegations in support of an interdict must appear in the affidavits in the first place. Where no such allegations are made in an affidavit, the Court should not allow an attorney's eloquent and forceful submissions to carry the day. This is what the Court is being requested to do and it is a course that I am disinclined to follow.

There is also a hidden pitfall in this prayer i.e. interdicting execution in the 1st Applicant's premises connected to this matter. It would be improper and unadvisable for this Court to grant this Order as it is difficult to fully contemplate at present what may happen in the future regarding this matter. This is moreso in view of the Respondents' allegations that the machinery which formed the basis for the judgement is in the 1st Applicant's premises and is being used there. It would be hazardous for this Court to be seduced into granting the Order as prayed in this regard. It is my view, regard had to the foregoing that this point is to be upheld albeit for different reasons from those raised by Mr Magagula.

I have, in dealing with the question of interdict also addressed the issue relating to the failure to file an affidavit by the 1st Applicant.

I order, in view of the foregoing that the matter proceeds to the merits, save and except the issue of the interdict. Costs are reserved for determination by the Court to hear the matter on the merits.

T.S. MASUKU
JUDGE