THE HIGH COURT OF SWAZILAND

FATIMA MAYET (BORN ESSACK)

Applicant

And

FREDERICK NDIRIWEMPI

1st Respondent

ALFRED NDIRIWEMPI

2nd Respondent

In Re:

FREDERICK NDIRIWEMPI

Plaintiff

SAMMY MAYET

Defendant

Civil Case No. 2044/1995

Coram	S.B. MAPHALALA - J
For the Applicant	MR. M. SIMELANE
For the Respondent	MISS SIMELANE

RULING

(On point in limine)

(12/09/2003)

The Applicant filed an application under a certificate of urgency for an order inter alia that the 2nd Respondent forthwith restores to the Applicant the vehicle described as follows: 1 tormer Nissan Bakkie (details as appearing on the return of execution) and further that the writ of execution issued by Messrs Millin and Currie is defective for want of compliance with Rule 16 of the rules of court.

The founding affidavit of the Applicant is filed in support thereto. A confirmatory affidavit of Sunny Mayet is filed of record. Various anmexures pertinent to the Applicant's case are also filed. A further confirmatory affidavit of Muzi Simelane the attorney for the Applicant is also filed.

The 1st Respondent opposes the application and the answering affidavit of the 1st Respondent is filed thereto. A further affidavit of the 2nd Respondent is also filed in opposition of this application. Various

annexures pertinent to the application are filed. A confirmatory affidavit of Hloniphile Jordan Simelane is filed of record.

In turn the Applicant filed a replying affidavit in answer to the Respondent's answering affidavit.
The 1st Respondent has raised point of law in limine which can be paraphrased as follows:

2.1. The Applicant has not adopted the correct procedure in dealing with this matter in that;

2.1.1. This s an action which purports to be a rei vindicatio, however not enough allegations have been made out in support of a claim of rei vindicatio.

2.1.2. That there is a dispute of fact and the matter should have been brought by way of interpleader action.

2.1.3. Although brought on a certificate of urgency the application fails to comply with the requirements of Rule 6 (25) (b) of the Rules of Court.

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Lastly, it was argued for the Applicant that for the Deputy Sheriff to have acted lawfully the property attached must be that of the Defendant to defeat the spoliation application.

In casu, the Applicant has shown that she was in peaceful and undisturbed possession of the vehicle and she has been despoiled of such possession. In this regard Mr. Simelane cited the authority of Silberberg and Schoeman's Law of Property 134 -138 and the case of Yeko vs Qana (supra).

These are the issues for determination. The crux of the matter as I see it is whether these are spoliation proceedings and if it found that they are, whether the Applicant has proved her case. The Applicant alleges that she has launched spoliation proceedings not vindicatory proceedings.

According to Baker et al, The Civil Practice of the Magistrates Court in South Africa (Vol 1) (7th ED) at page 85 in order to obtain a spoliation order two allegations must be made and proved:

i) That the Applicant was in peaceful and undisturbed possession of the property; and

ii) That the Respondent deprived him of possession forcibly and wrongfully against his consent (see Nino Bonino vs De Lange 1906 T.S. 120).

In the present case the Applicant has not made and proved the above-mentioned requisites. In the founding affidavit these two allegations are conspicuously absent. The court is merely invited to glean through the said affidavit. It is trite law that according to the above-cited authority these requirements should appear ex facie the Applicant's founding affidavit.

Therefore the Applicant cannot succeed in spoliation proceedings.

The action also purports to be a rei vindicatio, however no allegations have been made out in support of a claim of rei vindicatio. According to Olivier et al, Law of

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Property (2nd ED) at page 128 the requirements for the rei vindicatio are the following:

a) Ownership - the claimant must prove his ownership of the thing (see Obrahim vs Deputy Sheriff, Durban 1961 (4) S.A. 265 (D)267 G).

b) A thing still in existence and identifiable.

c) Control (see Vulcan Rubber Works (Pty) Ltd vs South African Railways and Harbours 1958 (3) SA. 285 (A)).

In casu the Applicant has failed or rather has not attempted to establish ownership in her founding affidavit. The closest averments bearing on the question of the ownership of the motor vehicle is found in paragraphs 8, 11 and 12 of the founding affidavit. Paragraph 8 reads in extenso as follows:

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Pursuant to the attachment of the vehicle, my attorney contacted the Respondent's attorney to advise them about the defects in the writ of execution and the fact that the property attached is not that of the alleged Defendant. Notwithstanding this explanation and production of documentary proof, the Respondent's attorneys informed my lawyer that there were still to take instructions. I did not understand what instructions were to be taken, as it was clear that the vehicle is not the property of the alleged Defendant. It was also brought to the Respondents attorney that even if the vehicle did not belong to the alleged Defendant, the marital regime under which we got married is one of out of community of property and there is no way that debts of my husband will have to be satisfied from assets belonging to me. I beg leave to refer this Honourable Court to annexure "FM3" being a letter written by our attorney to Respondent's attorneys.

Paragraph 11 and 12 reads as follows:

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As aforesaid the matter is urgent because the vehicle is used by my husband to run various family errands, it is also used for purposes of the business. The absence of the vehicle simply means that for all transport requirements, we now have to hire a car and already we have spent over E2000.00 just this past weekend and the longer the vehicle is away, this figure will escalate.

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The last point of law viz 2.1.3 was not pursued when the matter came for arguments, therefore no further comments will be necessary.

It is contended on behalf of the Respondent that the Applicant has not adopted the correct procedure in dealing with this matter in that it is an application for restoration of possession of an attached motor vehicle yet in its founding affidavit it has failed to establish the grounds upon which a court can base the granting of the relief claim in that the action purports to be spoliation proceedings yet not enough allegations have been made out in support of a claim of spoliation i.e. i) that Applicant was in peaceful possession, and ii) that she was unlawfully deprived of such possession. To support this view the court's attention was directed to the case of Yeko vs Qana 1973 (4) S.A. 735. Further that Applicant has failed to establish even a clear right to the use of the vehicle. The Applicant has failed to established being in possession of the vehicle as opposed to the Defendant, she has not even alleged being in possession in her founding affidavit save and except to mention that the marriage regime between herself and the Defendant was out of community of property at paragraph 8 of her affidavit. That such an allegation is unfounded and baseless.

It is contended further that the action also purports to be a rei vindicatio, however no allegations have been made out in support of a claim of rei vindicatio. The Applicant has failed or rather has not even attempted to establish ownership in her founding affidavit, which fact Respondent disputes. In the circumstances' the application contains insufficient allegations to sustain the cause of action consequently the Applicant has failed to make allegations in support of the relief sought.

Furthermore, it is submitted that Applicant is seeking a relief under a wrong procedure and should have

anticipated a dispute of fact arising. She should have brought the matter by way of interpleader proceedings or action proceedings because of a likelihood of a dispute of fact arising which cannot be determined in application proceedings. There is a serious dispute whether Applicant is the owner of the vehicle and the Respondent disputes that she is the owner not that she and not Defendant, was in possession of the vehicle. The Respondent contends that this application cannot be decided without the need to adduce oral evidence a fact which should have been anticipated by the Applicant. For this proposition the court was directed to the South

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African case of Room Hire vs Jeppe Street Mansions (Pty) Ltd and Rule 58 of the High Court Rules.

Finally it was argued on behalf of the 1st Respondent that the writ of execution was properly executed in accordance with the law.

On the other hand it is contended on behalf of the Applicant that these are spoliation proceedings and not vindicatory proceedings. In casu the interpleader is inappropriate because the purported attachment of the vehicle is not pursuant to a writ of execution issued in accordance with the rules of this court. The attachment is not lawful nor has it been done with the consent of the Applicant.

The Applicant alleges a fraud was perpetrated in this case in that the summons indicate that the name of the Defendant is SAMMY MAYET, yet the writ of execution indicates that the Defendant is SUNNY MAYET. Without filing necessary notice of amendment, the Plaintiff's attorneys changed the name of the Defendant contrary to Rule 28. The proposed amendment would have been objectionable on the basis that it would amount to an introduction of a new part to the proceedings.

It was contended further that the writ of execution was defective in that the attorneys of record are Harold Currie and Company and not Millin and Gurrie. No notice of substitution has been filed rendering the writ defective for want of compliance with Rule 16. The writ is also fatally defective for want of compliance with Form 20 in that if Harold Currie is still the attorney of record as alleged in the answering affidavit then the writ has to bear the name of Harold Currie and his address and not Millin and Currie.

Furthermore, it was contended for the Applicant that the attachment was not in accordance with Rule 45. The allegation here is that the Ad Hoc Deputy Sheriff never demanded to be shown the property of the Defendant (Sammy Mayet) but merely placed under attachment the Applicant's vehicle.

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The matter is rendered urgent also by reason of the fact that the attachment is wrongful and it should not have happened in the first place. As aforesaid, the vehicle is used for commercial purposes and this application is one way I seek to mitigate the attendant damages resulting from the wrongful attachment.

In my respectful view, these paragraphs cited above fall short in proving ownership for purposes of a rei vindicatio. Therefore even under the rei vindicatio the Applicant cannot succeed.
In the result, the application is dismissed with costs.

S.B. MAPHALALA

JUDGE