IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 2969/04

HELD AT MBABANE In the matter between :

	APPLICANT
GABRIEL MNISI	
AND	FIRST RESPONDENT
MSHIKASHIKA NGCAMPHALALA	SECOND RESPONDENT
MBALENHLE MOTORS & SPARES	THIRD RESPONDENT
MESABIE WHEELS AND SPARES	FOURTH RESPONDENT
MAKHISHI MATSEBULA STANFORD THEMBA	FIFTTH RESPONDENT
	SHABANGU AJ MR.
CORAM	SIMELANE MR. W.
FOR APPLICANT FOR	MKHATSHWA
RESPONDENT	

JUDGEMENT 12th

The applicant one Gabriel Mnisi commenced proceedings by way of an urgent application before this court on or about 15th July, 2004 against the respondents, seeking an order in the following terms;

> *"1. That the Deputy-Sheriff be and is hereby empowered to attach and take into his safe custody the vehicle whose particulars appear below, pending finalisadon of these proceedings...*

2. Ordering that a rule nisi do hereby issue calling upon the Respondents to appear and show cause, if any, to this Honourable Court at a time and date to be determined, by the above Honourable Court why an order in the following terms should not be made final.

2.1 *Directing the Respondents to restore to the Applicant the motor vehicle described above.*

2.2 *Setting aside the purported sale of the motor vehicle to the first Respondent as null and void.*

2.3 *Directing that the rule nisi referred to in paragraph two above operate with immediate effect pending the outcome of these proceedings.*

2.4 *Directing that the court order together with the Notice of motion, affidavit be served together by the Acting Deputy-Sherrif.*

2.5 *Directing that Respondents pay the costs of these proceedings on an attorney and own client scale in the event that the same is opposed.*

2.6 *Granting the Applicant such further and or alternative relief as the above Honourable Court seem meet. "*

It appears from the record that the application came before the Acting Chief Justice who granted an order in terms of paragraphs one to five of the Notice of Application. The rule nisi which was issued was returnable on 13th August, 2004. The issue of costs claimed in terms of paragraph five of the Notice of Application was reserved. On the return date of the rule nisi before Mr. Justice Matsebula the first respondent undertook not to dispose of the vehicle which was the subject of the proceedings and the rule was discharged. The matter was eventually heard and argued before me on 31st August, 2004. The particulars of the vehicle which is the subject of this litigation are given by the applicant as follows:

Make	:	Mercedes Benz 280 SE
Model	:	1989
Type	:	Sedan
Registration No.	:	SD 559 IN
Engine No.	:	DO 989-62-032841
Chassis No.	:	ADB 12602262080645
Colour	:	Metallic Green

Mr Simelane for the applicant submitted that the applicant's cause of action is the *rei vindicatio.* It is trite that the essential elements of the cause of action known in our law as the *rei vindicatio* are two, firstly that the applicant is the owner of the thing claimed (whether movable or immovable) and secondly that the respondent is in possession of the

applicants' property at the time of the instimtion of the proceedings. CHETTY V. NAIDOO 1974 (3) SA 13(A), JXENA V. MINISTER OF LAND 1955 (2) SA 380. An t applicant or plaintiff who has established the two aforementioned essential elements is entitled to the relief he seeks which relief ordinarily is for the return of his property. The respondent may raise defences which dispute either one or both of the abovementioned essential elements of the cause of action. The respondent may deny that the applicant is the owner and if at the end of the proceedings the court is unable to find that the applicant or plaintiff has established his ownership over the property the claim would not succeed. Similarly the respondent or defendant may successfully defeat the applicants' or plaintiff's claim as the case may be by disputing that he is still in possession of the thing claimed. In both the defences outlined above the onus to establish the essential elements of the cause of action is on the applicant or plaintiff. No onus shifts to the defendant or. respondent other than the evidential burden. Once the two essential elements of the cause of action constituting the *rei vindicatio* have been established as already observed, the cause of action for the relief claimed is established. However even if it is common cause that the *res* is owned by the plaintiff or applicant and that it is in the possession of the defendant or respondent, the latter may still defeat the claim by alleging and proving a right to possess the *res* inspite of the fact that the two essential elements of a *rei vindicatio* have been established. In this latter situation the onus to establish the right of possession is on the defendant or respondent, (see CHETTY'S case *supra).* If the plaintiff or applicant concedes that it gave the defendant or respondent the right to possess the *res,* by for instance a lease, the plaintiff or applicant must allege and prove a valid termination of the right, (see CHETTY'S case supra. MATADOR BUILDINGS (PTY) LTD V. HARMAN 1971 (2) SA 21 (C). The onus resting on the applicant or plaintiff who concedes the right of a plaintiff to possess the *res* at some earlier stage must allege and prove the terms of the agreement such as a lease which creates the right of cancellation.

In the present case it is common cause that the vehicle claimed by the applicant was in the possession of the first respondent at the time the proceedings were commenced. The applicant has also given evidence as to how he acquired ownership in the vehicle he

ctaims. The applicant says that he purchased the motor vehicle from Dickron Motors CC in Benoni, in the Republic of South Africa. The applicant goes on to explain that he brought the vehicle to Swaziland following its delivery to him by the said Dickron Motors C C in Benoni. The applicant caused the vehicle to be registered in Swaziland into his name. The first respondent has responded by saying that he has no personal knowledge of how the applicant acquired the vehicle and that he can neither admit nor deny same. There is therefore no dispute as to the applicant's ownership of the vehicle, (see ROOM HIRE CO (PTY) LTD V. JEPPE STREET MANSIONS (PTY) LTD 1949 (3) SA 1155 (T). This would *prima facie* entitle the applicant to the return of his vehicle. The next question which arises therefore is whether the first respondent has established a right which entitles him to retain possession of the vehicle.

The first respondent is the current possessor of the vehicle which the applicant is claiming in the present proceedings. The second respondent is described as "a firm of dealers in second hand vehicles and spares at Malkerns in the Manzini District." The second respondent firm is described as being owned by the fifth respondent who is referred to in paragraph six of the founding affidavit as Stanford Themba. The fourth respondent a certain Makhishi Matsebula is described as an adult Swazi male and sales person of the second respondent based in Manzini. The applicant alleges in the founding affidavit that he entrusted the aforementioned motor vehicle on the second respondent who was represented by the fourth and fifth respondent in order that a sale would be facilitated. Indeed after describing in paragraphs seven and eight of the founding affidavit how he acquired ownership of the vehicle in June 2003 from Dickron Motors CC in Benoni in the Republic of South Africa, the applicant proceeds to describe the purpose for which he entrusted the vehicle on the second respondent as follows:

In paragraph nine the applicant says;

> *"9. Seeing that my personal needs were not to be fully serviced by a sedan type of vehicle, I approached the second respondent to enquire if they can (sic) sell my vehicle as I needed a bakkie. Both fourth and fifth respondents agree that they can facilitate the sale of my car and as they are dealers in second hand vehicles, they will be on the lookout for anyone selling a bakkie. On the strength of that understanding I duly surrendered my vehicle to them for display. A copy of the agreement is annexed hereto and marked "G.M.4"*

The first respondent who appears to be the only respondent who has filed opposing affidavits to the application responds by saying that he does not have personal knowledge of the contents of paragraph nine of the founding affidavit and cannot admit or deny same. From what is stated in paragraph nine of the founding affidavit it does not appear that the second, fourth and fifth respondents were authorised to conclude a sale on behalf of the applicant. They were required to simple facilitate a sale. Annexure G.M.4 is not a very clear document in the manner it purports to describe the scope and terms of the authority given to the second respondent firm. Annexure G.M. 4 is headed Agreement of Selling a car and is dated 3rd June, 2003. In so far as it may be relevant to these proceedings the first paragraph reads,

> *"I, Mr. Grabriel Mnisi (have bought a car Mercedes to sold (sic) by the garage Mbalenhle and have agreed to pay a sum of El000-00 as a commission for selling my car. Failing to pay would mean I should be brought before the law to state why I am failing.*

Annexure G.M. 4 then proceeds to give the particulars of the vehicle and the price at which it ought to be sold is fixed at E35,000-00. After stating that the vehicle is sold together with the spare wheel, wheel spanner and radio it is signed by the applicant who is described as the owner and the fourth respondent one Makhishi Matsebula appears to have also signed on the line space provided for the "garage". After being advised by the fourth respondent that the vehicle had been sold for E25,000 the applicant says he notified the fourth and fifth respondents that the money was insufficient and that the respondents should obtain a "bakkie" for him. He says at that point he was given a cash receipt which was issued to first respondent on behalf of second respondent. The receipt that was given to the applicant makes reference to a deposit of E7000 and a balance of E18,000 which balance is described as payable in ten days time. There is also an annexure GM5 which is reflecting that the sale was concluded at 12 p.m. on 31st August, 2003 between the first respondent and second respondent. However the said annexure "GM5" does not appear to have been signed by the first respondent. A certain Mr Gina appears to have signed as the buyer. Indeed at paragraph twenty one of the answering affidavit it is mentioned that the vehicle's purchase price was paid for by one Thomas Gina who is described by the first respondent as having done this as a loyal subject under

hh (the first respondents') chieftaincy. Even though there is space provided for inserting the buyer, seller and the Garage on the last page of the "agreement" the names of the parties on this last page do not appear to correspond with the description of the parties at the opening section of the said agreement. The seller as identified on the last page though not sufficiently legible is certainly not Mbalenhle Motors. Similarly the buyer as reflected on the last page appears to be the said Gina instead of the first respondent. The same confusion exists with regard to Annexure G.M. 11 which significantly purports to be a sale of the same vehicle purportedly concluded an hour earlier than 12.00 noon at which time Annexure G.M.5 was purportedly signed. A further complicating factor is that not only do G.M. 5 and G.M. 11 purport to be agreements of sale in respect of the same vehicle but the purported agreements sell the vehicle at different prices and terms. There is an ambiguity as already observed above as regards the identity of the parties.

A further difficulty in the way of the first respondent arises from the fact that the capacity to conclude a sale or any contract on the part of the said Mbalenhle Motors is doubtful. Mbalenhle Motors which also purports to be a party to annexure "GM4", "GM5" and "GM 11" is not shown on the papers to have legal personality on its own so as to have contractual capacity. It appears to be a thing, namely a business owned by the fifth respondent. A thing in our law is not a bearer of rights and duties. It is only persons, both natural and artificial persons who are bearers of rights and or duties and therefore possess the capacity to contract. This is so trite that one does not need to cite authority to support the legal proposition I am making. From all the above, namely the ambiguity within annexures G4, G5 and Gil individually and between such documents and the fact that the document described as a deed of sale does not appear to have two identifiable persons as persons to the sale, it seems to follow that logic dictates that the so called contracts are *void ab initio.* This conclusion would entitle the applicant to the relief he claims in paragraph 2.2. of the Notice of Application. Infact it is not a question of setting aside the sale because there was no sale at all. The result is that there is no basis or right shown which entitles the first respondent to retain possession of the vehicle. In the circumstances the application is granted and the respondent is ordered to restore to the applicant the motor vehicle described as a 1989 Mercedes 280E, registered SD 559 IN

engine num5er D0989 6

∧ in The reA-pendents are also ordered ∧ No; ADB12602262080 645. metallic

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A(-TING *JUDGE*----------'