

THE HIGH COURT OF SWAZILAND

Civil Case No.2138/03

In the matter between:

THE ATTORNEY GENERAL 1st Applicant
THE COMMISSIONER OF POLICE 2nd Applicant

And

SENZO NXUMALO 1st Claimant
UNION RISK MANAGEMENT ALLIANCE (PTY) LTD 2nd Claimant

In re:

SENZO NXUMALO Applicant

And

THE COMMISSIONER OF POLICE 1st Respondent
THE ATTORNEY-GENERAL 2nd Respondent

CORAM : MASUKU J.

For the Applicants : Ms Mkhwanazi

For the 1st Claimant : No appearance

For the 2nd Claimant : Mr S. Dlamini (Millin & Currie)

JUDGEMENT 4th June 2004

This matter has seen numerous twists and turns in its not very long history. The chronicle of relevant events may briefly be summarised as follows: On the 7th July, 2003, the Royal Swaziland Police (hereinafter referred to as the "R.S.P.", seized and attached a motor vehicle described as an Isuzu K.B. Series, bearing engine number 4JB3666022, chassis No. ADM

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TER 55 DFM 833970 and registration number PJM 298 G.P. The seizure of the vehicle was ostensibly carried out by the R.S.P. in terms of the provisions of the "Theft of Motor Vehicles Act No. 16 of 1991.

The 1st Claimant, from whom the vehicle was seized, moved an application before this Court, seeking the release of the said vehicle. The RSP opposed the application which served before Nkambule J, who delivered a Ruling on the 24th September, 2003, in which he found that there was a dispute regarding the identity of the motor to be released. He ordered viva voce evidence to be led and reserved the question of costs.

On the 28th August, 2003, while the Ruling referred to above remained reserved, the 2nd Claimant, under the above Case number, applied for an Order on an urgent basis in terms of which the Police would continue to have custody of the vehicle in question, pending an application by the 2nd Claimant for the release of the vehicle to it. This Order was granted by Shabangu A.J., on the 29th August,

2003, and the matter was postponed on many occasions thereafter, including being struck off on one occasion. It suffices to mention that the 1st Claimant vigorously opposed the 2nd Claimant's application.

On the 6th February, 2004, the matter served before me on the Contested Roll and after giving due consideration of the matter and in particular, after realising that there were two claimants, to the vehicle, I ordered the Attorney General and the Commissioner of Police, to file an Interpleader Notice in terms of Rule 58 of the High Court Rules. This was to be done within fourteen (14) days of the Order.

The said Notice was filed by the Attorney General on the 10th March, 2004, and amongst other things, it called for the 2nd Claimant to file the particulars of its claim. No reference was made in the said Notice regarding the 1st Claimant filing the particulars of his claim. On the 30th April, 2004, Shabangu A.J. ordered the 1st Claimant to file the particulars of his claim on or before the 5th May, 2004, and postponed the matter to the 7th May, 2004.

When the matter again served before me on the 4th June, 2004, having been postponed on various occasions from the 5th May, 2004, the 1st Claimant had not filed the particulars of his claim as ordered by Shabangu A.J., nor was any application for extension of time made. I should also point out in this regard that the 2nd Claimant itself did not file its particulars

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within the time stipulated in the Interpleader Notice, which would have been by the 30th March, 2004. The said particulars were only, filed on the 29th April, 2004, about four (4) weeks later. It does not appear that any application for condonation or extension of time, in terms of the provisions of Rule 27 was made or granted. It is also not clear on the papers whether an agreement between the parties was reached in this regard.

Mr Mdladla, for the 1st Claimant filed a Notice in terms of the provisions of Rule 30 (1) of the Rules of Court dated 6th May, 2004, seeking an Order setting aside the 2nd Claimant's particulars of claim on the grounds that it "failed to comply with the provisions of Rule 58 (3) and that there has been no application for condonation nor is (sic) the 2nd Claimant filed a claim herein". This Rule 30 Notice to me suggests clearly that there was no agreement inter partes regarding the filing of the 2nd Claimant's particulars after the lapse of time indicated in the Interpleader Notice.

Mr Mdladla did not appear in Court to argue the 1st Claimant's case. An oral application for the postponement of the matter at his behest and on his behalf, which was in any event opposed by the 2nd Claimant's attorneys, was refused. The said Rule 30 Notice begs comment. It hardly lies in the mouth of the 1st Claimant, who was and is presently in default of complying with an Order of Court to point an accusing finger at the 2nd Claimant for not applying for condonation and for not having filed its particulars.

The allegation is also made in the Rule 30 Notice that the 2nd Claimant failed to comply with the provisions of Rule 58 (3). The respects in which the 2nd Claimant is allegedly in default have not been particularised. My reading of the said sub-Rule, places no burden on either claimant, the 2nd Claimant, in particular, to do anything in furtherance of the Interpleader Notice. Rule 58 (3) only prescribes the matters that must mandatorily be provided for and included in the Interpleader Notice, which Notice it must be recalled, is prepared, in casu, by the Applicants and not the 2nd Claimant. This attack in my view lacks any substance.

The only issue for determination, is whether the 2nd Claimant's particulars must be considered, it being common cause, and Mr Dlamini conceded this, that they were filed four weeks after the date stipulated in the Interpleader Notice. The relevant Rule, being Rule 27 (1) reads as follows: -

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"In the absence of agreement between the parties, the court may upon application on notice and on

good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such as to it seems fit."

It is clear that where a party in both claimants' position is in default of complying with time limits in proceedings, an application for condonation on notice is absolutely critical. This presupposes that the provisions of Rule 6 come into play and an affidavit must be filed in which amongst other things, the Applicant must state cogent and substantial grounds upon which the Court can be satisfied that the element of "good cause", required in the sub-Rule has been fully met.

In this regard, Erasmus, in his work entitled, "Superior Court Practice", Juta, 1997 at B1-171, states the following.

"Two principal requirements for the favourable exercise of the Court's discretion have crystallised out. The first is that the applicant should file an affidavit satisfactorily explaining the delay. In this regard, it has been held that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives. The Court will refuse to grant the application where there has been reckless or intentional disregard of the rules of Court, or the Court is convinced that the applicant does not seriously intend to proceed. The application must be bona fide and not made with the intention of delaying the opposite party's claim. "

This the 2nd Claimant has not done. It has simply proceeded, running rough-shod over the time limits placed and within which it ought to have filed its particulars. I am of the view that the time limits set out in the Interpleader Notice qualify for extension or abridgement in terms of Rule 27 and the 2nd Claimant may not seek to proceed with its claim oblivious to its default. The time limits referred to above are actually set out in Rule 58 (3) as not being less than fourteen (14) days and it is clear therefor that they fall neatly within the pigeonhole of matters to which Rule 27 applies.

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I am of the firm view that notwithstanding the 1st Claimant's default in filing its particulars and its non-appearance to argue the Rule 30 application, the Court is not entitled to peruse and consider the 2nd Claimant's particulars in the absence of an application for condonation on notice and which has been heard and granted. For the above reasons, I make no order on the 2nd Claimant's application for the release of the motor vehicle.

The 2nd Claimant, if so advised, may move a application for condonation or abridgement, if any, within fourteen days of this judgement. I order that the Police continue to hold the vehicle in their custody in the interim. If no such application is moved within the period set out above, the 2nd Applicant is hereby authorised to dispose of the motor vehicle in terms of the provisions of Section 23 of the Theft of Motor Vehicles Act, 1991.

T.S. MASUKU

JUDGE