THE HIGH COURT OF SWAZILAND

Civil Case No.837/03

In the matter between:

E.I.S. MARKETING (PTY) LIMITED Applicant

And

MASWAZI NSIBANDE N.O. 1st Respondent

HASSEN MANSOOR 2nd Respondent

GLEN TWEEDIE 3rd Respondent

In re:

HASSEEN MANSOOR Plaintiff

And

GLEN TWEEDIE Defendant.

CORAM : MASUKU J.

For the Applicant ; Mr M.B. Magagula (Millin & Currie)

For the Respondent : Mr E.M. Simelane

JUDGEMENT 21st June, 2004

Relief Sought

This is an application in which the Applicant prays for the following relief: -

1. Declaring the purported attachment of the Augsburg Alpine Fine Impact Mill 630 UP 2 by the 1st Respondent unlawful

2 Alternatively: -

1.1 Setting aside the purported attachment of the Augsburg Alpine Fine Impact Mill 630 UP 2 by the 1st Respondent.

2. Interdicting the removal of the said machine from the Applicant's premises at Flat 515,12th Street, Matsapha Industrial Sites, Matsapha.
3. That the 1st and 2nd Respondents be and are hereby ordered to pay the costs of this application on the scale between attorney and own client.

Background

The 2nd Respondent obtained a summary judgement against the 3rd Respondent on the 30th May, 2003 for the payment of E192, 850.00, interest thereon and costs. It would appear that in execution of that judgement, the 1st Respondent attached the machine referred to above which was at the Applicant's premises at the time.
Martina Jacomina Sauerman, the Deponent to the Applicant's Founding Affidavit, states that the

Applicant is the owner of the machine in question, having acquired it from the 3rd Respondent and his partner, one Berahard Schutte in June, 2002. She states that the Applicant had initially entered into an agreement of rental and sale of the machine with the Respondent and his business partner. The agreement, a copy of which was annexed to the papers, was entered into at Matsapha on the 26th November, 2002.

The machine was installed at the Applicant's premises aforesaid. Thereafter, Tweedie and Schutte became indebted to the Applicant in amounts in the excess of E274, 000.00. An agreement of set off was thus entered into between the Applicant of the one part and Tweedie and Schutte of the other. This was in recognition of the amounts due by the Applicant to the Tweedie and Schutte, in respect of the machine. In consequence of this agreement, Tweedie and Schutte transferred all their rights, title and interest in and to the machine to the Applicant, who accepted transfer in full and final settlement of all claims the Applicant had against Tweedie and Schutte. A copy of the set off agreement was also annexed to the papers.

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It is in view of the set off agreement that the Applicant contends that it is the owner of the machine and that it was in peaceful and undisturbed possession of the said machine from the time of the installation of the machine after conclusion of the rental agreement.

The Applicant states that in early December, 2003, the 1st Respondent came to the Applicant's premises and purported to attach the machine. When advised that the machine belongs to the Applicant, the 1st Respondent stated that the 3rd Respondent had told him that the machine belongs to him and that it should be attached in order to satisfy his indebtedness to the 2nd Respondent.

The Applicant informed its attorneys of the imminent attachment and it was advised to make payment by a post-dated cheque. This cheque appears to have assuaged the 1st Respondent. This advice was complied with. When the full story was later related to the Applicant's attorneys, it was realised that in fact the Writ was issued against Tweedie and had nothing to do with the Applicant. The payment of the cheque was therefor stopped.

On the 6th February, 2004, the 1st Respondent again called at the Applicant's premises to attach and proceeded with dismantling the machine. The lst Respondent refused to reason, resulting in an ex parte application being moved and granted, restraining the 1st Respondent from removing the machine.

The 2nd Respondent, in opposition to the said application, filed an affidavit in which he alleges that the machine belongs to Tweedie, Schutte and one Dumisa Mahlambi. The 2nd Respondent further, contends that the rental agreement and purchase and sale of the mill is null and void for non-compliance with the Stamp Duties Act No.37 of 1970.

The Respondents also attacked the agreement of set off for failure to comply with the Stamp Duties Act. Furthermore, the 2nd Respondent also attacked the authenticity of the signatures of the agreements. A confirmatory affidavit or Dumisa Mahlambi was attached. Mahlambi, in the affidavit alleged that he co-owned the machine together with Tweedie and had no objection to it being attached in satisfaction of the Writ.

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The matter must be considered with one prime consideration in mind. The Writ of Execution in Issue and dated 2nd June, 2003, authorised the Sheriff or his lawful Deputy, to attach the movable goods of Glen Tweedie. No other person or entity was cited in the Writ as a Co-Defendant and whose property was liable for attachment in terms of the said Writ. For that reason, an attachment of another person's goods would clearly be wrong and ultra vires the strict confines of the enabling Writ of Execution.
With the foregoing in mind, I proceed now to consider the various grounds of opposition raised by the Respondents.

(a) Alleged Invalidity of Agreements

The main founding upon which the Respondents based their argument is that the agreements do not comply with certain provisions of the Stamp Duties Act, No.37 of 1970, (hereinafter referred to as "the Act"). The provision relied upon in this regard is Section 13 (1) of the Act, which has the following rendering: -

"Save as is otherwise expressly provided in any law, no instrument shall he made available for any purpose whatever unless it is duly stamped, and in particular shall not be produced or given in evidence or be made available in any court of law, except in criminal proceedings, or in any proceedings by or on behalf of the Government for the recovery of any duty on such instrument or of any penalty alleged to have been incurred under this Act in respect of such instrument. "

Section 13 has a proviso which states the following: -

"Provided that the court before which any instrument is tendered may permit or direct that, subject to the payment of any penalty incurred in respect of such instrument under Section 10 (I), it be stamped in accordance with this Act and upon the instrument being duly stamped may admit it in evidence."

It is worth noting that section 13 is entitled, "Invalidity of instruments not duly stamped". Notwithstanding the use of the word "invalidity" in the title of the Section, there is no indication in the body of that Section that an instrument, to which duty applies but has not

been stamped, thereby becomes invalid. In terms of the Section, the instrument shall not be produced or given in evidence or be made available in Court. In other words, the Court may not have regard to it and its contents for want of compliance with the provisions of the Act. That does not, in the absence of clear and unambiguous language serve to invalidate the instrument in question as both the Applicant and Respondents' representatives believed.
The parties in this matter, including the Applicant assumed that the agreements in issue were subject to stamp duty as provided in the Act. The relevant place to look at in determining whether any duty is payable in respect of the contracts in issue is the Schedule, containing the tariff of stamp duties. No.2 of the Schedule, dealing with agreement or contract provides as follows: -

"Agreement or contract, in respect of which no other duty is specifically provided .....E1.00.

Exemptions

(a) an agreement or contract, other than a hire purchase agreement or contract or agreement of lease, which relates to the sale, supply or delivery of goods, wares or merchandise including livestock and agricultural produce; and

(b) an agreement or contract for the hire of domestic servants, labourers or seamen. "

I must confess that the language employed in (a) above is ambiguous and is in my view subject to two divergent interpretations of agreements or contracts in respect of which the exemption obtains. In my view, if my interpretation is correct, the exemption applies to agreements or contracts which relate to the sale, supply or delivery of goods wares or merchandise, including livestock and agricultural produce. Agreements or contracts relating to hire purchase or contracts or agreements of lease do not enjoy exemption from liability to pay stamp duty.

The first agreement does not fall, in my view in the pigeonhole of agreements subject to stamp duty. Further, it does not fall within the category of matters in relation to which No. 16 of the schedule i.e. dealing with lease or agreement of lease. I say so for the

reason that item No. 16 relates to immovable property. The machine in issue is clearly 'movable. Similarly, I am of the view that even the agreement of set off is not subject to the provisions of the Act, falling as I see it, within the category of exemptions.

I would, based on the foregoing, find that the Applicant has made sufficient allegations to prove ownership for the aforesaid machine. This would be so in the light of the provisions of the agreements referred to above.

Should I not be correct in this regard, I need to consider an argument raised by Mr Magagula for the Applicant. This argument is premised on the assumption that the agreement offends against the provisions of the Act in the manner referred to above.

Mr Magagula submitted that the Applicant, did make sufficient allegations in the Founding Affidavit which prima facie show that it was entitled to retain the machine. This is to be found in paragraphs 7 and 8, and paragraph 12 of the Founding Affidavit. The said paragraphs provide the following: -

"7. The Applicant is the lawful owner of a certain Augsburg Alpine Fine Impact Mill 630 UPZ, which it acquired from the 3rd Respondent with is partner Bernhard Schutte, on or about 20th June 2002.

8. The Applicant had initially entered into an agreement of rental, purchase and sale of Alpine Fine Impact Mill 630 UPZ, with the 3rd Respondent and his partner Bernhard Schutte. In that agreement the Applicant was represented by Stephanus Sauerman and myself. The said agreement was entered into at Matsapa on 26th November 2002. A copy of the aforesaid agreement is attached hereto marked "MJS 1"

12. The parties then agreed to a set off, in terms of which Messrs. Tweedie and Schutte transferred all their rights, title and interest in and to the said Alpine Mill, to the Applicant who accepted such transfer in full and final settlement of all claims the Applicant may have had against Messrs. Tweedie and Schutte."

Mr Magagula, argued that the copies of the agreements were attached to the papers for purposes of record, sufficient allegations regarding ownership having been made in the affidavits, independently of the copies of the agreements. I agree with this line of reasoning.

In GOLDBLATT VS FREMANTLE 1920 AD 123 at 128 - 9, Innes C.J. stated the following: -

"Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract.... At the same time, it is always open to the parties to agree that their contract shall be a written one..., and in that case, there will no binding obligation until the terms have been reduced to writing and signed. The question is in each case one of construction. "

Grotius 3, 14, 26 also holds the same view. He states the following: -

"The contract of sale may be in writing or without writing. A written sale is not considered to be complete until the writing has been fully executed. But with us, although there is mention of writing, this is understood not to be with a view to a written contract, but merely for the purpose of reducing to writing the terms agreed upon for better remembrance and proof unless there is clear evidence of a contrary intention."

See also R.H. Christie, The Law of Contract 3rd Ed, Butterworths, 1996 at page 116 and the authorities therein cited.

I am of the view that this is the light in which the matter should be viewed. There is no indication whatsoever that the intention of the parties was that writing would embody the contract. In the premises, the Court is entitled in my view, to assume that the written texts were made to afford the facility of proof of the verbal agreements or as Grotius puts it, for purposes of better remembrance and proof.

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With the foregoing in mind, I am of the considered opinion that Mr Magagula is correct. What is of more significance is that other than relying on the alleged invalidity of the documents and which has been considered in detail, above, the Respondents only recorded a bare denial, and have not placed before Court any material which can be said to dislodge the position asserted by the Applicant as to its ownership of the machine.

If Mahlambi is correct that he is the joint owner, it was incumbent upon him to show how he and his partner became owners and how the property reached the Applicant to enable the latter to deal with it in a manner suggesting ownership or at the least, lawful possession. The attack on the witnesses to the agreement, in my view are of no moment in the light of my conclusions above. The Respondents, it may be added, have not explained, if they were the owners, Mahlambi added in that list of owners, why they did not do anything since June, 2002, when the Applicant took possession of the machinery. The inaction, particularly of Mahlambi is in this regard telling.

Tweedie, it is apparent, does not contest the ownership of the machine by the Applicant. Because of Mahlambi's inaction, and allowing Tweedie and Schutte to deal with the machine as if they were the sole owners and therefor in a position to alienate the machine and to pass transfer, I am of the view that Mahlambi is estopped from claiming ownership. In the circumstances, a third party in the position of the Applicant was entitled to believe that Schutte and Tweedie were the owners and therefor entitled to dispose of it. His conduct amounted to a negligent representation upon which the Applicant relied and acquired the machine, thus acting to its detriment. For the foregoing reasons Mahlambi, is in my view estopped from claiming ownership of the machine at this juncture.

In this regard, I refer to OAKLAND NOMINEES LTD VS GELMA MINING & INVESTMENT CO. LTD 1976 (1) SA 441 (AD) at 452, where Holmes J.A. stated the following: -

"Consistent with this, it has been authoritatively laid down by this Court that an owner is estopped from asserting his rights to his property only –

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(a) where the person who acquired the property did so because, by the culpa of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner or was entitled to dispose of it;

(b) (possibly) where, despite the absence of culpa, the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept of the exceptio doll"

(c) I am of the view that (a) is fully applicable to Mahlambi. The requirements, for estoppel to succeed, as stated by Holmes J.A. (infra) at paragraph F - G have in my view been satisfied in view of what I said above. The elements are the following: -

(i) There must be a representation by the owner, by conduct or otherwise, that
(ii) the person who disposed of his property was the owner was entitled to dispose of it.
(iii) The representation must have been made negligently in the circumstances;
(iv) The representation must have been relied upon by the person raising estoppel; and

(v) Such person's reliance upon the representation must be the cause of his acting to his detriment.

See also JOHAADIEN VS STANLEY PORTER (PAARL) (PTY) LTD 1970 (1) SA 409 (AD).

I am of the view, in the circumstances that the Applicant has shown that it is the owner of the machine. The Respondents have dismally failed to allege and prove otherwise. In the circumstances, the 1st Respondent, in view of the clear and unambiguous wording in the Writ of Execution was not entitled to attach the Applicant's property, particularly where the basis of the alleged ownership of the machine was so shaky as to constitute sinking sand as it were. I also find, for the reasons appearing above, that Mahlambi is estopped from claiming ownership of the machine.

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I am of the view that the Applicant is entitled to relief, which is hereby granted in terms of prayers 1,2 and 3. The conduct of the Respondents in pursuing this matter in view of the clear wording of the Writ, together with the agreements, in my view entitle the Applicant to costs on the punitive scale. If the Respondents believed that the machine belonged to Mahlambi and his partners, then the proper route to follow was to seek a declarator and not to harass the Applicant by seeking to remove the machine, under the guise of attachment, which was in any event not authorised by the very Writ relied upon.

The 3rd Respondent did not oppose this application and I find no reason why he should be tarred with the same brush as the 1st and 2nd Respondents, who are hereby ordered to pay the costs at attorney and own client scale jointly and severally, the one paying and the other being absolved.

T.S MASUKU

JUDGE