

THE HIGH COURT OF SWAZILAND

SAMUEL TSABEDZE

Applicant

And

WINILE MNGOMETULU

Respondent

Civil Case No. 4585/2005

Coram: S.B MAPHALALA-J

For the Applicant: MR. T.MLANGENI

For the Respondent: MR. K. VILAKATI

RULING
(10th February 2006)

[1] The Applicant has applied that interim custody be issued to him forthwith pending the filing of the full socio-economic report regarding the two minor children in this dispute. The main reason advanced in support thereto is that the children will then and there be enrolled for their educational needs with their father. On the other hand it was argued, *inter alia*, for the Respondent that it would be proper to leave the two children in the custody of the Respondent their mother until the court decides the whole matter. If they were released to

the Applicant and the court then finds that

[1] Presently before court is an application brought under a Certificate of Urgency interdicting and restraining the Respondents from proceeding with the sale of execution of two Mercedes Benz buses registered SD 702 OM and SD 834 VM; that the attachment in execution by the 1st Respondent of the aforesaid vehicles be declared null and void *abninitio* and/or uplifted; and that the Respondent pay costs of the application.

[2] The parties have joined issue by the exchange of the required affidavits.

[3] It is common cause that the judgment sought to be executed, has nothing to do with the Applicant, as it involves a third party and the 3rd Respondent. The Applicant contends that the buses belong to him. The 2nd Respondent which is the judgment creditor denies that the buses belong to the Applicant and avers that they belong to the 3rd Respondent hence it is said that they are executable.

[4] The Applicant has annexed to its affidavits a resolution authorising the sale of the buses to it as well as proof that it actually paid for the buses, a fact which is strenuously denied by the 2nd Respondent.

[5] The 2nd Respondent in opposition thereto denies that there was a management contract between the 3rd Respondent and Grand Wheels (Pty) Limited as no proof of such contract has been annexed to Applicant's Founding affidavit. The proof which was belatedly annexed in Applicant's Replying affidavit was nothing but an afterthought and a clear fabrication. The 2nd Respondent also questions the resolution. On the final interdict, it is contended that Applicant has not shown a clear right and that it has no other suitable remedy because it can still sue for damages in due course. It should be noted that the 3rd Respondent, although served with the papers and is a party to the proceedings have not denied the existence of the sale and has not opposed the application.

[6] When the matter came for arguments *Mr. Simelane* for the Applicant submitted that Applicant has made out a case for the relief sought and that the 2nd Respondent has not raised

a defence herein. The court was referred to the case of *Setlogelo vs Setlogelo 1914 AD 1*.

[7] *Mr. Magagula* for the 2 Respondent advanced a multi-pronged argument. Firstly, that there was no genuine sale of the buses by 3rd Respondent to Applicant as alleged. The annexures being "SZM1", "SZM2" and "SZM3" are fabrication intended to defraud and defeat 2nd Respondent's claim against the 3rd Respondent. The vehicles in question belong to and are registered in the name of 3rd Respondent as clearly appears from annexures "SZM4" and "SZM5" being copies of the relevant Blue Books. The annexures in the Applicant's Replying affidavit are an afterthought and a fabrication. In this regard the court was referred to the case of *First National Bank vs S.A. Nkosi and Company - Civil Case No. 1386/01, 1387/01, 1388/01* at page 7. Secondly, that even if one were to say there was a sale as alleged, same is invalid as it amounts to an alienation of the buses by the 3rd Respondent intended to defraud 2nd Respondent, a creditor of the 3rd Respondent. Holmes J in the case of *Fenhalls vs Ebrahim and others 1956 (4) S.A. 723* at 729 stated the following:

"An alienation in fraud of creditors may be set aside at common law. A debtor is considered to have effected a fraud if the assets of the debtor after the alienation are insufficient to satisfy his creditors".

[8] The third prong of the argument is that Applicant has failed to prove a clear right in this matter since his right of ownership over the attached items is not clearly established the items are clearly registered under the name of the 3rd Respondent. Further, that Applicant has an alternative legal remedy in the form of an action for damages against the 3rd Respondent who allegedly sold him the attached items. In this regard the court was referred to the case of *Kharafa Trading (Pty) Ltd vs Zodvwa Maziya and another - Civil Case No. 3283/2001*.

[9] The crux of the matter in *casu* revolves around the questions as to who owns the attached buses. Is it the Applicant as *per* annexures "SZM1", "SZM2", "SZM3", "SZM7" and "SZM8" or is it the 3rd Respondent as *per* annexures "SZM4" and "SZM5"? If I find that it is the former I ought to grant the final interdict but if I find that it is the latter I then have to dismiss the application forthwith. In resolving this issue a question arises as to whether the annexures filed of record constitute conclusive evidence *ex facie*. Another question would be, should I consider the probabilities in arriving at the conclusion as to who owns the buses. It appears to me that *viva voce* evidence should be led in this matter on this point of ownership. In this case, it is my considered view that a dispute of fact exists which cannot be resolved on

affidavits. In this regard I refer to the case of *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 (T)* at 1163 on the "principal ways" in which a dispute of fact may arise.

[10] In the result, I refer the matter to oral evidence on the point of ownership of the buses, and it so ordered. The question of costs reserved for the time being.

S.B. MAPHALALA

JUDGE