

THE HIGH COURT OF SWAZILAND

SIRON MOTORS (PTY) LTD

1st Respondent

MKHULEKO MAVUSO

2nd Respondent

SIPHO GAMA

3rd Respondent

MATHEW GAMA

4th Respondent

And

ISAIAH MASILELA Applicant

Civil Case No.1811/2007

CORAM: S.B. MAPHALALA J.

For the Applicant: Mr B. Mdluli

For the Respondents: Mr M. Mabila

JUDGMENT

13th December, 2007

[1] The applicant in this application seeks to vindicate his motor vehicle being a Toyota Hilux van Registered SD 821 NS on the basis that the 1st, 2nd and 3rd Respondents acting jointly fraudulently used illicit means to deprive him of his motor vehicle and purportedly

sold the motor vehicle to the 4th Respondent.

[2] In the notice of motion dated 28th May, 2007 the applicant seeks for an order in the following terms;

1) Dispensing with the normal rules relating to time limits, forms, procedure.
2) That the First, Second, Third and Fourth Respondents be and are hereby ordered and directed to release to Applicant's possession motor vehicle, being a;

Make: Toyota Hilux van 3000 kz-te Colour: Navy blue Registration No: SD 821 NS Chassis No:

AHT31LNK208000159 Engine No: V0290305967 Year of manufacture: 2002

Together with its blue-book.

3) Interdicting and/or restraining the first, second, third and fourth Respondents from using, alienating and/or disposing the aforesaid motor vehicle.

4) Authorising and directing the Deputy Sheriff for the District of Manzini to forthwith seize, tow if need be, attach and/or remove from whosoever and wherever the said motor vehicle may be found and deliver it to the Applicant or his Attorney together with its blue-book.

5) Further directing that members of the Royal Swaziland Police either based at Manzini or Matsapa Police Station in the District of Manzini to take such action as may be necessary to assist the Deputy Sheriff in order to ensure that this Order is carried out.

6) That a Rule *Nisi* to operate forthwith as an interim order be and is hereby issued pending the return date to be fixed by the above Honourable Court calling upon the Respondents to show cause why:

i) the order referred to in paragraph 1,2,3,4,5 above should not be made final.

7) Costs of suit

8) Granting such further and/or alternative relief.

[3] According to the Applicant he is the lawful owner of the motor vehicle which he bought for E95,000.00 from Cornel Lennet, a Matsapha Business following its display at 1st Respondent's premises. The motor vehicle was transferred and registered into applicant's name on the 10th May, 2005 in terms of the Road Traffic Act of 1967. The Blue Book is still registered in applicant's name. As the engine was not in proper running condition applicant requested 2ⁿ and 3^r Respondents to take it for service and that was the last time he had sight of his motor vehicle up until he discovered that 2nd and 3rd

Respondent had unlawfully sold the motor vehicle without his knowledge and/consent to the 4th Respondent. 1st and 3rd Respondents later disappeared and even avoided applicant's telephone calls and upon confrontation sometimes, they would tell applicant that his motor vehicle was still being attended to at a certain Matsapha Garage and that the garage was still waiting for certain engine parts from South Africa.

[4] Applicant was granted an interim order on 1st June, 2007 which order was subsequently confirmed against the 1st, 2nd and 3rd Respondents on the 22nd June, 2007. The Applicant contends that the matter is now academic and the only remedy the 4th Respondent has to claim damages and/or compensation from 1st, 2nd and 3rd Respondents.

[5] According to the 4th Respondent in his opposing affidavit on the 7th November, 2005 he bought the aforesaid motor vehicle from the 1st Respondent who acted through 2nd and 3rd Respondents herein, for the sum of E95,000.00. When he bought the motor vehicle he was told by the 2nd and 3rd Respondents that they were servicing the car on behalf of the applicant. He actually negotiated the purchase price from E1 05, 000.00 when he bought the aforesaid motor vehicle he did a trade in of his motor vehicle valued at E45,000.00 and paid cash in instalments to the total sum of E50,000.00. After he had paid the purchase price in full on about July, 2006 he was given the registration documents of the aforesaid motor vehicle. 4th Respondent contends that the sole reason why the applicant is not disputing that he had mandated the 1st Respondent to sell the motor vehicle is because he feels that the other Respondents have no attachable assets in the event he gets judgment against them, for their failure to remit payment to him. That applicant should sue the other respondents for the purchase price as they acted as his agents.

[6] In arguments before me counsel for the applicant filed very comprehensive heads of arguments for which I am grateful to counsel for his industry.

[7] In arguments regarding the 4 Respondent, counsel for the applicant relied on what is

said by the learned authors **Kleyn and Boraine, the Law of Property, 3rd Edition at page 270** to the following effect;

"As pointed out an owner who has been deprived of his property against his will is, as a general rule is entitled to vindicate it from any person who is in possession of it. This is so irrespective of whether that reason is a *bona fide* or *mala fine* possessor..."

[8] 4th Respondent alleges that applicant authorized 1st, 2nd and 3rd respondents to sell the motor vehicle. In as much as any purported authorization is denied, that allegation remains hearsay as that cannot even be substantiated and/confirmed by way of confirmatory affidavits by the 1st, 2nd and 3rd Respondents. The affidavit by one Mandla Joseph Dlamini was just an afterthought by the 4 Respondent. Mandla J.Dlamini was not even present when applicant took the car for service. He is not even known to the applicant.

[9] It is contended further for the 4 Respondent that applicant in his papers does not allege any *mala fide* on the part of the 4 respondent. Furthermore, that applicant does not allege that 4th Respondent had any knowledge of the allegation that 1st and 3rd Respondents had no authority to sell the motor vehicle. That the 4th Respondent has demonstrated clearly that if it is a *bona fide* purchaser of the motor vehicle and this is accepted by the applicant. In the circumstances, the applicant cannot be afforded any relief as against the 4 Respondent hence the application should be dismissed with costs and applicant is at liberty to sue the 1st and 3rd Respondents for damages. To support the 4th Respondent's case the court was referred to the cases of **Smodern Lukhele Vs Nkosingiphile DIamini - Civil Case No.107/2001 (per Masuku J.)** and that of **David M. DIamini Vs Xolani Shongwe - Civil Case No. 2050/1999 (per Maphalala J.)**.

[10] In my assessment of the arguments by the parties I am inclined to agree with the position adopted by the 4th Respondent. I say so because the 4th Respondent has clearly demonstrated that he is a *bona fide* purchaser of the motor vehicle and this fact is

accepted by the applicant. Applicant does not argue that 4th Respondent had any knowledge of the allegation that 1st and 3rd Respondents had no authority to sell the motor vehicle. It is common cause between the parties that 1st Respondent is (or was) in the business of selling motor vehicles and operated so, to the knowledge of the public at Moneni area in Manzini. The Applicant is at liberty to sue the 1st and 3rd Respondents for damages.

[11] In the result, for the foregoing reasons the application is dismissed with costs.

S.B. MAPHALALA

JUDGE