

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Case No. 884/2008

NAWAZA MUZALIWA DADHA

Applicant

And

FRED HAWLEY

Respondent

Coram

S.B. MAPHALALA - J

For the Applicant

MR. DLAMINI

For the Respondent

MR. B. MAGAGULA

JUDGMENT

3rd October 2008

[1] On the 11th March 2008, Applicant filed an urgent application against the Respondent for an order as follows:

1. Dispensing with the usual time limits, procedures and manner of service provided for in the rules of the above Honourable Court and hearing this matter as one of urgency.
2. Condoning the Applicant for non-compliance with the said rules.
3. Directing the Respondent to forthwith deliver to the Applicant the motor vehicle being:

MAKE:	Toyota Corolla, Sedan
CHASSIS NO:	AE1000083669
Engine No:	5AB184086
REGISTRATION NO:	SD 138 WG

4. Directing the Deputy Sheriff to search, seize and deliver the aforementioned motor vehicle to Applicant whenever same can be found.
5. That the deputy sheriff be authorised and directed to take possession of the motor vehicle wherever the same may be found and to deliver same to the Applicant.
6. The Respondent pays the costs of this application at an attorney-client scale.
7. That orders 1, 2, 3, 4 and 5 above operate as an interim order with immediate effect calling upon the Respondent to show cause why the said orders should not be made final.
8. That the said rule *nisi* be returnable on the 28th March 2008.
9. Further and/or alternative relief.

[2] The application is founded on the affidavit of the Applicant Nawaza Muzaliwa Dadha with an annexure being

a copy of the Blue Book of the motor vehicle in question as annexure "NMD1". A Confirmatory affidavit of one Nicholas Atumisi Feruzi is also filed.

[3] The Respondent opposes the application and has filed an affidavit in this respect. In the said affidavit he has raised two points *in limine* and has also addressed the merits of the case. Presently this court is concerned with the determination on these points *in limine*. I wish to further add that I apologize profusely for the delay in handing down a judgment on these points in view of other matters which clamoured my attention.

[4] These points *in limine* read *ippssima verba* as follows:

IN LIMINE

3. The Applicant has failed to cite Mr. Lucky Gama the owner of the motor vehicle described in paragraph 3 of the Applicant's Notice of Motion. Mr. Lucky Gama is an interested party in that he has a material interest in the matter as the motor vehicle in question was sold to him on the 6th of March 2007.
4. In light of the fact that ownership of the vehicle has now vested in a third party being one Lucky Gama, it follows that the Applicant has got no *locus standi in judicio* to seek the relief sought in prayer 3 of the Notice of Motion. The third party has a better right to the vehicle as he is the new owner.

[5] *Mr. Magagula* for the Respondent in his arguments motivating the point *in limine* raised and cited what is

stated by the learned author *Herbstein et al, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 170. The learned author stated that if a third party has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the court is satisfied that he has waived his right to be joined. Such a person is entitled to demand as of right that he be joined as a party and cannot be required to establish in addition that it is equitable or convenient that he should be joined as a party, (see also authorities in Folio 42 to 44 of the said text).

[6] On the other hand *Mr. Dlamini* for the Applicant also cited the same legal authority in *Herbstein* at page 171 to the proposition that as an alternative to joinder, the court may order that judicial notice of the proceedings be served on the party and will then be prepared to proceed in the absence of the party if, in response to the notice, there is clear evidence of a waiver by the party of his right to join the proceedings. In this regard the court was referred to the case of *Eden Village (Meadowbrook) Pty Ltd and Another vs Edwards and Another 1995 (4) S.A. 31 (A)* at 46

E - 48E.

[7] Having considered the arguments of the parties as stated above I am inclined to agree with the approach enuanciated in the case of *Eden Village (supra)*. I say so because of the delay in issuing this judgment that the third party be served with the application and the relevant affidavits filed of record and has to indicate of his intention to join the proceedings within 7(seven) days from the date of this judgment. I further rule that costs to be costs on the merits of the application.

S.B. MAPHALALA

PRINCIPAL JUDGE