

HIGH COURT OF SWAZILAND

Held at Mbabane

Thembi Khanyisile Bhiya

Applicant

vs

Jabulile Persis Maziya

1st Respondent **Eslie Lobatsakatsi Maziya**

2nd Respondent **Master of the High Court**

3rd Respondent **Attorney General**

4th Respondent

Civil Case No.3778/08

Coram

MAPHALALA PJ

MR. M.M. SIMELANE

MR. T. NDLOVU

For Applicant For Respondent

JUDGMENT 2nd SEPTEMBER 2009

[1]

The issue for decision presenting in an application in terms of Rule 30 for an order in the following terms:

"1. Setting aside and/or deeming the Applicants founding affidavit as an irregular step in terms of Rule 18(12) for failure to comply with Rule 18(6) of the Rules of Court:

2. The plaintiffs cause of action is based on a contract of a sale of a motor vehicle, described in the applicant's application;

3. Inasmuch as the applicants papers are fatally inconsistent with one another, i.e.

4. At paragraph 15.1 and 15.2 of the applicants founding affidavit, the applicants claims to have entered into the agreement of sale with one Father Emmanuel Lutaya;

5. However, in an earlier affidavit, made by the same applicant at the masters office, attached to the same application and marked page 8, the applicant's claims to have entered into the sale and/or ownership agreement with "the family" in particular one Nkosinathi Maziya.

1.3 Whichever one of the two parties she decides to allege to have contracted with, applicant, in terms of Rule 18(6) has failed to state whether or not such contract of sale, of her, of the motor vehicle was on writing or oral, where and by whom it was concluded.

6. Costs of suit;

7. Further and/or alternative relief."

[2] The Respondents contend that the Applicant's Founding Affidavit does not comply with the peremptory provisions of Rule 18(6).

[3] Rule 18(6) provides as follows:

"A party who in his pleading relied upon a contract shall state whether the contract is in writing or oral and when, where and by whom it was concluded, and if the contract is a written one a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

[4] Subrule 12 goes on to state that:

"If a party fails to comply with any of the provisions of this subrule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with Rule 30".

[5] That in *casu* the basis of the Applicant's cause of action is to be found in

paragraph 15.1 in the Founding Affidavit wherein she states:

"I then approached Mr. Lutaya to *sell me the car*. I was in the presence of Mr. Agrippa who witnessed the *sale transaction*".

[6] The Respondents contend that for Applicant to hold them liable for the return of the said motor vehicle under her alleged contract, Applicant was bound to plead the contract of sale in terms of Rule 8. Her alleged contract of sale relating to the *merx* is an essential link in the chain of her cause of action.

[7] In support of this argument the court was referred to a number of South African judgments including that of *van Tonder vs Western Credit Ltd 1966(1) S.A. 189*, *Sasol Industries (Pty) Ltd t/a Sasol vs Electrical Repair Engineering (Pty) Ltd t/a LM Martinusen 1992(4) S.A. 466* and that of *Vorster vs Herselman 1982(4) S.A. 857*.

[8] The final argument advanced for the Respondent is that even the latter agreement has not been properly pleaded in terms of Rule 18, however, both affidavits are wholly inconsistent with one another and create a confusion as to who exactly did Applicant contract with; who exactly transferred rights of ownership of the *merx* in question to the Applicant and against where does Applicant's cause of action lie. There is therefore a fatal inconsistency in the Applicant's affidavit read alone and these are totally embarrassing to the Respondents in their defence.

[9] On the other hand Applicant contends that the manner the Respondents have objected to the Applicant's case is quite irregular as they were entitled to apply for striking out in terms of Rule 23. That Rule 30 applies only to irregularities of form and not matter of substance.

[10] In this regard the Applicant has cited the cases of *Singh v Vorkel 1947(3) A 400* © at 406, *Minister of Law and Order vs Taylor No. 1990(1) S.A. 165 (E)*, *Kithron vs Fihrer & San (Pty) Ltd 1982(3) S.A. 353 (W)* at 361 and that of *MTN Swaziland Limited vs Accountant Professional Consultants (unreported) High Court case No. 1390/2003*.

[1]

[11] After assessing the arguments of the parties in this regard it appears to me that the Applicant is correct that the application in terms of Rule 30 is misconceived. I agree with the Applicant's contention that the manner the Respondent have objected to the Applicant's case is quite irregular as they were only entitled to apply for striking out in terms of Rule 23. Clearly, Rule 30 applies only to irregularities of form and not matters of substance. I find that the authorities cited in paragraph [9] *supra* apposite on the facts of the present case.

[12] On the merits of the case I again agree with the Applicant that the grounds for *rei vindicato* have been proved on the facts of the matter. Applicant has proved that she is the owner of the *merx*. (See *Condini Chrome (Pty) Ltd vs Mcc Contracts (Pty) Ltd 1993(1) S.A. 77 (A) 782*).

[13] The Respondents were in possession of the property at the time of the application. (See *Jeena vs Minister of Lands 1955(2) S.A. 380 (A)*). The manner in which the Respondents have objected to the Applicant's case is quite irregular as they were only entitled to apply for striking out in terms of Rule 23.

[13] In the result, for the foregoing reasons the application in terms of Rule 30 is dismissed with costs. A final order is granted in terms of the Notice of Motion in prayers 1, 2, 3, and 4 thereof.

S.B. MAPHALALA

Principal Judge