



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 3682/2006

THEMBA ROD MAGAGULA

Applicant

And

SANDILE MYENI

1st Respondent

LAURETTA DESOUSA

2nd Respondent

Coram

S.B. MAPHALALA - J

For the Applicant

MR. T. MASEKO

For the Respondent

MR. S. BHEMBE

JUDGMENT

5th March 2009

[1] Serving before court is an application brought under a Certificate of Urgency calling upon the Respondents to show cause, if any, on a date and time to be determined by this court why they should not be ordered and directed to return to the Applicant forthwith, the motor vehicle a Jaguar XJ16 green in colour registered SD 222 RN. That para 2.1 operate as an interim order with immediate effect

pending the return date. In prayer 3 thereof costs of the application.

[2] The Founding Affidavit of the Applicant is filed in support of the application. Pertinent annexures are also filed.

[3] The Respondents oppose the application and has filed the Answering Affidavit of the 1st Respondent where a point *in limine* has been raised. This point is outlined in para 4 of the Answering Affidavit as follows:

4.1 The said motor vehicle was voluntarily given or surrendered to me by Applicant on the 7th August 2008. He has not done anything for all these days since the 7th of August 2008.

4.2 Applicant voluntarily paid to Respondents attorneys Ben J. Simelane & Associates, the judgments debt of E43, 000-00 on the 12th August 2008 as reflected by annexure "SB4" hereto attached. If Applicant felt that the "attachment" was unlawful he should have moved the application than not to wait until the 16th September 2008.

4.3 After Applicant had paid the judgment debt, he tried to negotiate with the attorney handling the matter, not to pay the costs of suit that was refused. Applicant then proceeded to report me to the Siphofaneni Police Station specifically to Officer Zulu who called me on the 15th August 2008, demanding that I return Applicant's motor vehicle. I refused to return the motor vehicle and told the officer that the motor vehicle was attached pursuant to an order of court.

4.4 I submit that Applicant should have made the urgent application then, if he felt that his motor vehicle was unlawfully attached.

4.5 Applicant further reported me to one Musa Shongwe who is employed at the High Court as an Assistant to the Registrar on or about the 18th August 2008. I was called by this Court official and I explained to him all that happened regarding this matter.

4.6 It is my humble submission that the alleged urgency in this matter is self-created by the Applicant by failing to file his application up until the 16th September 2008 when he realized that the motor vehicle is about to be sold in execution of the judgment.

[4] After I have assessed the arguments of the parties on urgency it would appear to me that Applicant had not proved urgency in accordance with the Rules of court in particular Rule 6 (25) (a) and (b). The Applicant failed to file his application up until the 16th September 2008, when he realised that the motor vehicle is about to be sold in execution of the judgment. However, in view of the time that has elapsed. I have considered this application in the long form and will now determine the main issue of whether the attached motor vehicle belonged to the Applicant in his personal capacity or the company.

[5] The Respondents contend that it is trite law that in as much as a company has its own legal authority which is distinct from that of the subscribers to the Memorandum and Articles of association of the company, the company does not act out on its own but through its directions. In this regard the Respondents argue the following points:

1.1.1 It is clear from the papers before court that Applicant is the Director of Makacine (Pty) Limited the company against whom judgment in the sum of E43, 000-00 was obtained.

1.1.2 First Respondent states at paragraph 8 (page 24 of the Book of Pleadings) that Applicant handed the motor vehicle to him in his capacity as Director of Makacine (Pty) Limited with the understanding that Applicant will settle the company debt with second Respondent's attorneys and he (First Respondent) will hand back the motor vehicle to Applicant.

1.1.3 It is also stated by First Respondent at paragraph 7.5 (page 23 of the Book of Pleadings) that such handing over of the motor vehicle was done voluntarily by Applicant after First Respondent had advised him that the initial motor vehicle attached was repossessed by Swazi Bank as it was subject to a Hire Purchase Agreement.

1.1.4 It is submitted therefore that at all material times, Applicant was therefore acting for and on behalf of Makacine (Pty) Limited as the Director. He cannot then claim that what he did voluntarily is unlawful just because the motor vehicle is not registered in the name of the company.

1.1.5 Applicant, by handing over the motor vehicle to First Respondent, represented to him that he (First Respondent) can hold the motor vehicle pending the payment of the

judgment debt plus costs. Applicant cannot turn around and say that such is illegal when it was voluntarily done by him as the director of Defendant company.

See: Universal Stores Ltd v OK Bazaars (1929) Ltd 1973 (4) SA 747 (A).

[6] In my assessment of the arguments of the parties it appears to me that there is a dispute of fact in this matter. The dispute is to whether the motor vehicle was surrendered to the Respondents. This dispute appears at para 1.1.3 above. This is the crux of the Respondents case. This dispute ought to be clarified in order to determine the rights of the parties regarding this motor vehicle.

[7] In the result, for the afore-going reasons I rule that oral evidence be led on how the motor vehicle came to the possession of the Respondents. Costs to be reserved for the time being.

S.B. MAPHALALA
PRINCIPAL JUDGE