



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 4443/2008

FLORENCE MAMBA

Applicant

And

MONGI SAMUEL TSELA

Respondent

Coram

S.B. MAPHALALA - J

For the Applicant

MR. Z. MAGAGULA

For the Respondent

MR. T. NDLOVU

JUDGMENT

19th March 2009

[1] On the 20th November 2008, the Applicant filed an Urgent application restraining and interdicting the Respondent from disposing and/or alienating a mini bus kombi being a Toyota Mini bus Engine No. 3y - 0620916 with Chassis No. LH 115 - 6000070 and registered SD 966 VL.

[2] The Founding Affidavit of the Applicant is filed with all the material facts in this case.

[3] The Respondent opposes the application and has filed an Answering Affidavit where a number of points *in limine* are addressed. Before addressing the issues in this case I wish to apologize profusely for the delay in issuing this judgment on account of other matters which clamoured for attention. The first issue raised *in limine* is that of urgency. The second issue is that of non- disclosure. The third and last point is that there are disputes of fact.

[4] In view of the time that has elapsed I do not think it would be proper to address the point concerning urgency. The matter is accordingly dealt with in the long form.

[5] The second point raised is that of non-disclosure. The argument in this regard is that this application is akin to an *ex parte* application and therefore Applicant owed a duty to the court to present all material facts. The Applicant has failed to make disclosure of the following:

- 3.1 The Applicant has failed to disclose to the court, and information that was within her knowledge, the material fact that a valid and

written deed of sale had been entered into pertaining to the said motor vehicle between myself and the said Themba Victor Sikhosana in the month of March. I beg leave to refer to the said deed of sale annexed hereto and marked "CJ2".

3.2 The said deed of sale was annexed to the correspondence copied to the applicant and dated the 29th September 2008 and was therefore within the applicants knowledge. She had a duty to disclose this to the court.

[6] In my assessment of the parties arguments I cannot say that this application is an *ex parte* application in that Respondent has filed an Answering Affidavit advancing a formidable defence. The times for filing of such may have been restricted but the fact of the matter is that an Answering Affidavit has been filled in answer to the averments in the Founding Affidavit. For these reasons this point *in limine* fails.

[7] The last point *in limine* is that this matter is riddled with serious and substantial disputes of fact that can never be

resolved on the papers alone. These include, but are not limited to the following:

4.1 There is serious dispute regarding the ownership of the motor vehicle. I wish to state that Applicant loaned to me a sum of E35, 000-00 (Thirty Five Thousand), and which sum I have duly been religiously repaying to her and into her account as appears from the receipts of payments annexed hereto.

4.2 Applicant did not enter into a sale agreement concerning the motor vehicle. It is I that entered into a sale agreement for the said motor vehicle with the said Victor Sikhosana. Applicant only has a limited right against me for repayment of her loan. She has no real right over the motor vehicle.

4.3 I wish to bring it to the courts attention that, and after Applicant had been served with the letter annexed hereto and dated the said 29th September 2008, Applicant found a way of misrepresenting to the said seller and hoodwinked and deceived him to sign a deed of sale in her favour. This deed of sale in the Applicants favour was made on the 3rd October 2008. I beg leave in the above regard to refer to the supporting affidavit of the said Victor Themba Sikhosana annexed hereto which throws light into the whole matter regarding the motor vehicle ownership.

4.4 The Applicant must have reasonably foreseen these disputes at institution hereof but chose to reconcile herself with them at the hope of obtaining a technical advantage over other litigants that have approached court by way of action.

[8] Having considered the arguments of Counsel in this regard I am inclined to agree with the Respondent that there is a serious dispute regarding the ownership of the motor vehicle. I refer to the case of *Elmon Masilela vs Wrenning Investments and Thomas Moore Carl Kirk - Civil Case No. 1768/2008 (unreported)* on this aspect of the matter.

[9] In the result, for the afore-going reasons the point of

law *in limine* on disputes of fact succeeds with costs.

S.B. MAPHALALA

PRINCIPAL JUDGE