# IN THE HIGH COURT OF SWAZILAND

**HELD AT MBABANE**

**CIVIL APPL.NO.363/09**

**In the matter between:**

**1st Applicant**

**2nd**

**JOMAR HOLDINGS (PTY) LTD**

**SWAZILAND BRAHMAN BREEDERS (PTY) LTD**

**And**

**1st**
**Respondent**
**2nd**

**JAY DEE INVESTMENTS (PTY) LTD**
**V.J. STEENKAMP**
**THEMBINKOSI MAZIYA**

**Date of hearing: 9 February, 2009**
**Date of Ruling: 13 February, 2009**

**Mr. Attorney N.S. Thwala for the Applicant Mr. Attorney M. Nkomondze for the Respondents**

**RULING**

**MASUKU J.**

[1] Serving before Court is an application for anticipation of a rule *nisi* granted by this Court on an *ex parte* basis on 30 January, 2009, in favour of the above named Applicants. The return date was fixed by the Court for 13 February, 2009.

[2] Acting in terms of the provisions of Rule 6 (22), the Respondents filed a notice, as required thereunder, anticipating the return date of the rule nisi, on proper notice to the Applicants.

[3] The background giving rise to the dispute in issue, as can be gleaned from the papers presently filed of record, can be summarized as follows: The Applicants and the 1st Respondent entered into an oral sale agreement in respect of certain trucks and trailers. These are described in full in paragraph [4] below. The total purchase price for the same was E2,500,000.00, of which the 1st

Respondent, through Nedbank, (Swaziland) Ltd, its financiers, paid an amount of E2,330,000.00.

[4] On the Applicants' version, which has not yet been controverted, there was an outstanding balance of E170,000.00, which was only in respect of two trailers and one 3 axle trailer. The former are registered SD 016 FN and SD 017 FN, respectively, whilst the latter is registered SD 182 OG. It is the Applicants' case that the 1st Respondent remains in arrears in the amount of E160, 000.00 and upon the Applicants learning that the said trailers, which were in the hands of the 2nd and 3rd Respondents, respectively, and were due to transport goods to the Republic of South Africa, the Applicants brought an *ex parte* application on an urgent basis, claiming the following relief:

1. Dispensing with the procedures pertaining to notice, service and time limits as prescribed by the Rules of this Honourable Court and directing that the matter be heard as one of urgency and be enrolled *ex parte;*

2. Condoning the Applicants non-compliance with the Rules of this Honourable Court;

3. Cancelling the subsequent sale agreement between the 1st Applicant and the 1st Respondent, of the trailers that are the subject of these proceedings;

4. Granting leave and authorizing the Deputy Sheriff to seize and attach the trailers described hereunder from the possession of the Respondents or wherever or with whomsoever they may be found, together with their respective motor vehicle registration (bluebooks) to wit;

**SUPER-LINK TRAILER** (consists of two trailers)

| | |
|---|---|
| 18.1 Registration | AE9A23H2TAAE1016 Jomar |
| Year of manufacture Chassis | Holdings (PTY) Ltd |
| Number Registration Owner | 22nd November, 1999 |
| Ownership Acquired Weight | 8360 kgs |
| SD 016 FN 1996 | |

| | |
|---|---|
| 18.2 Registration | SD 017 FN 1996 |
| Year of Manufacture Chassis | AE9236H2TAAE1015 Jomar |
| Number Registration Owner | Holdings (PTY) Ltd 22nd November, |
| Ownership Acquired Weight | 1999 6440 kgs |

**3 - AXLE TRAILER**

| | |
|---|---|
| 18.3 Registration | SD 182 OG |
| Year of Manufacture | 1994 |
| Chassis Number | 9411160066 |
| Registration Owner | Swaziland Brahman Breeders (PTY) Ltd 22nd |
| Ownership Acquired Weight | November, 1999 7935 kgs |

5. Restraining and interdicting the Respondents from alienating, vandalizing, and encumbering and or using the aforementioned trailers pending the finalization of these proceedings.

6. The 1st Respondent pay the costs of this application and the 2nd Respondent and 3rd Respondent pay the costs of the same in the event they oppose this application.

7. That a *rule nisi* returnable on a date to be appointed by this Honourable Court do hereby issue calling upon the Respondents to show cause why prayers 1, 2, 3, 4, 5 and 6 should not be made final.

8. Further and/or alternative relief.

[5] The *ex parte* urgent application served before Court on 30 January, 2009 and the Court issued an Order in terms of prayers 1, 2, 3, 4, 5 and 6 of the Notice of Motion captured above. As earlier indicated, the Court issued a *rule nisi* with interim effect, the return date of which was determined to be 13 February, 2009.

[6] In the interregnum, the 1st Respondent, on notice to the Applicants, filed a notice to anticipate the return date of the rule *nisi,* claiming that the Orders granted were oppressive to it and prejudiced its rights and interests. It is that application with which this Ruling is concerned. In its wisdom, the 1st Respondent opted to raise points of law only, confident, according to their legal representative, that these points of law would carry the day, thus obviating a need to deal with the matter on its merits. It remains to be seen whether this confident posture was sagacious.

[7] In a nutshell, the points of law raised by the Respondents and on the basis of which this Court is urged to discharge the rule *nisi,* are the following: -

7.1 Urgency;

7.2 *Lis Pendens;*

7.3 Incompetence of Orders sought;

7.4 Non-*joinder,* and

7.5 Failure to disclose material facts in the *exparte* application.

[8] At the hearing, Mr. Nkhomondze abandoned the first and the last points. Regarding the first, the abandonment was clearly on the basis that he was not conceding that the matter was sufficiently urgent to warrant the invocation of the urgency procedures. I had, in any event, indicated my difficulty with having to determine the issue of urgency once again in light of the fact that the learned Judge who granted the rule *nisi* determined that the matter was urgent in the first instance. Not only would it be the work supererogation for me to reopen that issue, but it would also be tantamount to this Court sitting in review over its own work, a situation which is clearly untenable. This point was wisely not pursued by the 1st Respondent's attorney.

[9] Regarding the latter point i.e. relating to the alleged lack of candour in disclosing the material facts, the Respondents were hamstrung by their own choice to file points of law without pleading over. The only proper way in which the material facts allegedly not disclosed would have been drawn to the Court's attention, would have been by way of affidavit, which the Respondents, apparently on advice, shied away from.

[10] For purposes of convenience, I find it prudent to commence with the issue relating to the alleged incompetence of the relief sought, regard had to the facts and allegations contained in the Applicants' founding affidavits. It would appear, from reading the papers that there are primarily two causes of action upon which the Applicants rely for the relief sought. First, is cancellation of the sale agreement referred to earlier, as recorded in paragraph 3 of the Notice of Motion. The last, which is contained in paragraph 23 is the *rei vindicatio.*

[11] In his spirited address, Mr. Nkhomondze argued that the Applicants, from their own papers have failed to show that they are entitled to either of the relevant prayers. He accordingly contended that the Court ought not to have granted the prayers that it did and that to that extent, this was a proper case for the Court to discharge the rule *nisi.*

[12] In respect of the *rei vindicatio,* Mr. Nkhomondze argued quite forcefully that the *rei vindicatio* was an inappropriate remedy for the Applicants to pursue regard

had to the fact that the property in question was given to the 1st Respondent in respect of a sale and that there was nothing to show that the possession by the Respondents of the property was in any way tainted with theft or other discreditable conduct.

[13] According to the learned authors Kleyn and Boraine, The Law of Property, 3rd ed., Butterworths, 1992, at page 273, that an owner cannot be deprived of his property against his will means that he can recover it from any person who retains possession of it without his consent. The learned authors cite Jansen J.A. in *Cketty vs Naidoo 1974 (3) SA 13 (A)* at *20 A - C,* where the learned Judge of Appeal reasoned as follows:-

> "*It may be difficult to define* ***dominium*** *comprehensively...but there can be little doubt (despite some reservations expressed in* ***Munsamy vs Gengemma 1954 (4) SA 468 (N)*** *at* ***470H - 47IE)*** *that one of its incidents is the right of exclusive possession of the* ***res*** *with the corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the* ***res*** *should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. right of retention or a contractual right).*" (Emphasis added).

[14] At page 274 - 275, the learned authors state as follows:-

"*It follows that the onus to establish any right to retain possession of the thing always rests on the defendant as long as the owner does not go beyond alleging his ownership and the fact that it is in the possession of the defendant. But if the owner goes beyond these averments and concedes (either in his statement of claim or in reply to a request for further particulars thereto, or* ***semble*** *in his replication) that the latter originally obtained possession of the disputed* ***res*** *in terms of a contract (such as a loan, lease or hire purchase agreement) he must allege and establish that such a contract has expired by effluxion of time or that he was entitled to cancel it and has in fact terminated it in other words:*

> '*a plaintiff who claims possession on by virtue of his ownership must* ***ex facie*** *his statement of claim prove the termination of any right he concedes the defendant would have had but for the termination*'."
> (Emphasis added)

[15] In the instant case, it is clear even from the Applicants' own affidavit that possession of the *merx* was given to the 1st Respondent in terms of an agreement of sale. The fact of the sale, which appears to be common cause, would therefore lead to the conclusion that there was nothing unlawful with the 1st Respondent's possession of the disputed property. That being the case, in terms of the above authorities, it is incumbent upon the Applicant *in casu* to show that the right by which the 1st Respondent was placed in possession of the *merx* had at the time the application was moved, been lawfully terminated. To find out whether this indeed is the case, one has to consider the Applicants' Founding Affidavit.

[16] It is worth noting in the first place that in the Notice of Motion, prayer 3 is concerned with an order for cancellation of the contract. There is nothing untoward with this. R.H. Christie, The Law of Contract in South Africa, 5th Ed Lexis Nexis, 2006 at page 538 says the following in regard to cancellation, particularly in relation to seeking an order cancelling the contract from the Court.

> "*The act of cancellation, which is also sometimes described as acceptance of the repudiation, rescission and (less felicitously) repudiation, may be performed by the innocent party himself, without the assistance of the court, in which case, technically, a subsequent court order would simply confirm the cancellation that he had already carried out, but a claim for cancellation (that is asking the court to cancel) is normal and the desirability of having an order for cancellation so that the status of the contract is not in doubt is well recognized.*"

[17] It having been established indubitably that the Applicants did, by including prayer 3 in the Notice of Motion seek the Court's confirmation and a certitude from the Court removing any doubt about the status of the contract, there is one important question in this regard. It is this - did the Applicants themselves cancel the contract before approaching the Court? The cancellation of the contract by the innocent party is a momentous and significant occasion as it changes significantly the status of the parties and their rights at law. R.H. Christie *(op cit),* states the following in regard to this issue at page 539:-

> "*Notice of cancellation must be clear and unequivocal, but need not correctly identify the cause of cancellation. It takes effect from the time it is communicated to the other party, communication by a third party being sufficient. If it has not previously been communicated, it takes effect from service of summons or notice of motion, unless the contract prescribed a particular procedure such as notice and notice of cancellation may be implied*

*from the service of a summons claiming damages.*" See also Al Kerr, The Principles of the Law of Contract, Butterworths, 6th Ed. 2002 at page 727.

[18] A reading of the Applicants' affidavit shows that the Applicants did not themselves, at any stage cancel the contract before approaching the Court on the present papers. It also does not appear, this having been an oral contract, what the provisions regarding notice particularly of cancellation were to be. It would appear to me that in the peculiar circumstances of this case, it being clear that this was an *ex parte* application, there was no notice of cancellation to the 1st Respondent before the Court dealt with the matter. This would, to my mind convey the position that when the Court granted the interim rule, there were no grounds upon which the application for a *rei vindicatio* could be sustained and eventually granted.

[19] I say so for the reason that the Court would ordinarily not be satisfied, in the absence of a cancellation at the time that the *ex parte* application was heard that the 1st Respondent's right to possess the *merx* in terms of the agreement of sale had ceased. On that ground alone, I am of the view that the order for the attachment of the trailers, as it is based on the *rei vindicatio* ought to be discharged and it is my considered view that subsequent service of the notice of motion, which, according to the authorities may serve as notice of cancellation can not *ex post facto* rectify the deficiencies that existed at the time when the interim order was issued, particularly because the application was moved on an *ex parte* basis. I am confident that had this legal position been brought to the Court's attention at the time that the *ex parte* application was moved, the Court would in all probability not have granted the Orders that it did on an *ex parte* basis.

[20] It was incumbent, in my view at the time the *ex parte* application was moved upon the Applicants to show that the contract in terms of which possession of the disputed property had been given to the 1st Respondent had been cancelled and it is upon the Court being so satisfied that it could, in the interim, grant the order for vindication of the property. In premises, it would appear to me that the application for the attachment of the *merx,* in the absence of a proper cancellation at the time of moving the application was clearly precipitous in the circumstances. The order for attachment may not in the light of the foregoing be confirmed. It is hereby discharged.

[21] I now turn to consider the propriety of the interim interdict issued by the Court. I shall deal with the said interdict at two levels. In the first place, with the finding made above that at the time that the *ex parte* application was heard and the interim orders, cancellation of the contract, it would appear to me that the Court

would not have been satisfied that the Applicants had a right to the interdict which was granted *pro ha vice.*

[22] I say so for the reason that an applicant for an interim interdict must show the following requisites to the satisfaction of the Court at the time that the application is moved; namely: (i) a *prima facie* right although open to some doubt; (ii) well grounded harm apprehended or already commenced; (iii) no alternative remedy; and (iv) the balance of convenience. See Prest, Interlocutory Interdicts, Juta 1993, page 55.

[23] It would appear to me that the absence of the notice of the cancellation at the hearing should have tilted the scales heavily against the Applicants being adjudged to have met the first requirement. The success of any order issued by the Court in the Applicants' favour, it would appear to me, hinged heavily if not exclusively on whether there was at the hearing of the *ex parte* application a proper notice of cancellation of the contract, which would have served as an acknowledgement on the part of the Applicants of a breach of the contract by the 1st Respondent and which acknowledgement would have had to be conveyed or successfully communicated to the Respondents by the time the *ex parte* application was moved.

[24] There are other reasons as well as to why the interim interdict ought to be discharged. It is now common cause that in order for an Applicant for an interdict to succeed, he or she must satisfy the Court of the existence of all the four requirements stated in paragraph [21] above *ad seriatim.*

[25] In particular, the founding papers should make reference to all the requirements to enable the Court to properly exercise its discretion. It is my view that the need to specifically address the requirements of the interim interdict in the founding papers becomes particularly necessary in *ex parte* applications where the respondent is not present before Court to tax the Applicant on the propriety of granting the interim interdict, and where possible, to try to persuade the Court to rule otherwise on the application to grant the interdict. A respondent should himself be left in no doubt that from the papers filed before Court and not only an embellishing address by the Applicant's Counsel, a case was made for the grant of the interim interdict, notwithstanding that he was not present to contradict the arguments in favour of the granting of the interim interdict.

[26] A reading of the Applicants' papers shows ineluctably that there was not even a feeble attempt on the part of the Applicants to address the requirements for the grant of an interim interdict.

[27] On this basis alone, I am of the view that the 1st Respondent has made a sufficient case for the rule *nisi* issued to be discharged. In this regard, I am of the view that with the Applicants having failed to make a case for the time being against the 1st Respondent, there can be no proper basis to grant the orders against the 2nd and 3rd Respondents. At this stage, and in the light of the findings of law arrived at, the case has not gone beyond the stage where the 1st Respondent would be required to give a full answer for its activities and dealings with the *merx* in question, including how the same landed in the hands of the 2nd and 3rd Respondents as alleged by the Applicants.

[28] In the premises, I do not find it necessary to advert to the other points of law raised on the 1st Respondent's behalf. I do need to say that although not considered microscopically, it would appear to me that the point relating to the plea *lis alibi pendens* was also well taken. I should mention, however, that on account of the common cause fact that this application was moved as an interlocutory one, the citation ought to have made reference to the action proceedings referred to in paragraph 32 of the Applicants' Founding Affidavit.

[29] On account of the aforegoing, I grant the following order:

29.1 The rule nisi with interim effect issued by this Court on 30 January, 2009 be and is here by discharged.

29.2 The Applicants be and are hereby ordered to pay costs of the anticipation of the return date of the rule nisi on the scale between party and party.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 13™ DAY OF FEBRUARY, 2009.**

**T.S. MASUKU**

**JUDGE**

**Messrs. Gigi A. Reid Attorneys for the Applicant**
**Messrs. Nkhomondze Attorneys for the 1st Respondent**