



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 235/2011

In the matter between:

JERRY DUMISANI NXUMALO

Applicant

And

NELSON LOKOTFWAKO N.O DEPUTY SHERIFF	1st	Respondent
MDUDUZI VILAKATI	2nd	Respondent
SIPHIWE SIBANDZE	3rd	Respondent

Neutral citation: *Jerry Dumisani Nxumalo v Nelson Lokotfwako N.O Depty Sheriff & 2 Others (235/2011) [2013] SZHC 222 (9th October 2013)*

Coram: **M. Dlamini J.**

Heard: **18th September 2013**

Delivered: **9th October, 2013**

Rule 58 – duty of deputy sheriff to file interpleader where there are more than one competing claim – failure to do so, deputy sheriff or messenger of court puts himself to a risk – deputy sheriff to take

neutral role – if he involves himself in claims, costs should be meted against him should the court find against him.

Summary: The present applicant by motion claims for a return of a motor vehicle BSD 527 BH on the basis that the said *merx* is a subject of a hire purchase agreement between Standard Bank and himself. This *merx* was in the possession of 2nd respondent when 1st respondent, a deputy sheriff, attached it following a writ in favour of 3rd respondent against 2nd respondent.

Background

[1] 3rd respondent successfully instituted action proceedings against 2nd respondent. Thereafter 3rd respondent instructed the 1st respondent who is a deputy sheriff to attach the motor vehicle which was in possession of 2nd respondent in order to satisfy the order in her favour. The 1st respondent duly complied.

[2] Applicant now claims that the attached motor vehicle belongs to him by virtue of a subsisting lease agreement between Standard Bank Ltd. and himself. He alleges that the motor vehicle had been in possession of the 2nd respondent through his consent as he had lent it to 2nd respondent.

[3] 3rd respondent ferociously opposes this application. Firstly, she raises a point in *limine*. She contends that the applicant ought to have filed an interpleader in terms of Rule 58. She avers in support of Rule 58:

“The applicant and the 1st respondent ought to have agreed to institute interpleader proceedings in terms of which the 1st respondent tendered delivery of the movable property to the Registrar of the High Court and

declared in the process that there were competing claims on the ownership of the movable property and urged this Court to determine who the owner was as 1st Respondent declared not to be colluding with any of the competing claimants.”

- [4] On the merits, she contends that applicant has not furnished this court with bank statements as proof of the lease agreement between Standard Bank Ltd and himself. She further informs the court that the 2nd respondent is in the business of buying and selling cars. She therefore disputes applicant’s averment that the motor vehicle had been given to 2nd respondent for his use.

Adjudication

- [5] Rule 58 (1) reads:

“Interpleader

Where any person, in this rule called “the applicant”, alleges that he is under any liability in respect of which he is or expects to be sued by two or more parties making adverse claims in this rule referred to as “the claimants”, in respect thereto, the applicant may deliver a notice, in terms of this rule called an “interpleader notice”, to the claimants. In regard to conflicting claims with respect to property attached in execution, the deputy-sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant.”

- [6] **Gardiner JP** expounding on this rule which is *pari materia* with that of South Africa stated as follows on **Bernstein v Visser 1934 CPD 270 at 272-3:**

“Now interpleader is a form of procedure whereby a person, who is a stakeholder or other custodian of movable property, to which he lays no claim in his own right, but to which two or more other persons lay claim, may secure that they shall fight out their claims among themselves, without putting him to the expense and trouble of an action or actions. Interpleader in the case of execution is a species of this genus.”

[7] The learned Judge proceeded to quote from **Mather on Sheriff and Executive Law 2nd Ed. 463:**

“Cases frequently arise where a third party makes an adverse claim to property seized by the sheriff under an execution, and that the latter, but for the following safeguard, would be consequently subject to considerable risk in the discharge of his duties, to meet which, relief by way of interpleader is provided.”

[8] While **Juta A.J.A. in Weeks v Amalgamated Agencies, Ltd. 1920 AD at 238** states:

“If he attaches goods while in the possession of the judgment debtor they are presumed to belong to the latter, and the messenger is not liable to the owner for such attachment. If on attachment or thereafter before they are sold, they are claimed by a third person, his duty is to take out an interpleader summons. If he neglects to do so he is answerable to the owner of the goods.”

[9] From the above authorities, it is clear that once the deputy sheriff becomes aware that there are two competing claims against the *merx*, he ought to sue out an interpleader. Once an interpleader is instituted, any action

proceedings filed by the claimant is stayed pending the interpleader as per sub rule 7 hereof. This form of procedure is meant to protect the deputy sheriff. If he fails to take out an interpleader, he puts himself into a risk of being meted out with costs should the claimant who is then applicant succeed. This form of procedure is filed before the deputy sheriff's or messenger of court's sale in execution the *merx* takes place.

[10] *In casu*, the 1st respondent has failed completely to sue out an interpleader. He is in the same vein as in **Bernstein** case *supra* where the messenger instituted an interpleader proceedings very late. The court held that as he had failed to sue out an interpleader "*forthwith*", he had put himself at risk. He was no longer protected.

[11] Similarly *in casu*, that the 1st respondent failed to sue out an interpleader, cannot be adverse to the applicant *in casu* but to the 1st respondent who has failed to adopt a procedure which would protect him.

Ad merits

[12] The bone of contention as raised by 3rd respondent is that the applicant has failed to produce conclusive proof that the *merx* is a subject of a lease agreement. She contends that in as much as the blue book is in applicant's name, this is not conclusive proof.

[13] I agree with 3rd respondent in that regard. This court takes judicial notice of the common practice where purchasers of motor vehicles do so without necessarily transferring ownership in terms of the blue book. This has been evident where the Government came out with new registration system.

Many motor owners had to solicit the persons they purchased the motor vehicles despite that they had purchased same years back.

[14] The 3rd respondent insisted that the applicant produces a statement from Standard Bank Ltd with a recent payment as proof that the property under issue was under lease. The applicant duly did that although by handing same from the bar.

[15] In view of the statement handed from bar by applicant of proof of the lease and from 3rd respondent's own showing, I find that as conclusive proof that applicant is the owner of the *merx* in issue and therefore cannot be a subject of attachment. 2nd respondent has no better title over the property.

[16] For the reason that applicant submitted conclusive proof of ownership of the *merx*, I am not inclined to order the 3rd respondent to pay costs to applicant.

[17] However, for the reason that 1st respondent paid total disregard to a procedure which would have protected him in this matter by failure to file an interpleader, costs against him are imperative.

[18] In fact, 1st respondent chose to be part of the proceedings by filing a confirmatory affidavit in contesting ownership against applicant. He was totally ill-advised. By so doing he put himself into a risk of incurring costs should the applicant's application succeed. He should have taken a neutral role as an officer of this court by filing an interpleader.

[19] In the premise, I enter the following orders:

1. Applicant's application succeed;

2. 1st respondent is ordered and directed to surrender or deliver to the applicant motor vehicle BSD 527 BH forthwith;
3. 1st respondent is ordered to pay costs of suit.

M. DLAMINI
JUDGE

For Applicant : Mr. Ntshangase

For Respondent : S. Matsebula