



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2400/2011

In the matter between:

JABULANI PATRICK TIBANE

Applicant

And

ALFRED SIPHO DLAMINI

Respondent

**Neutral citation: Jabulani Patric Tibane v Alfred Siphon Dlamini (2400/2011)
[2013] SZHC 25 (28th February 2013) (reportable)**

Coram: M. Dlamini J.

Heard: 25th September 2012

Delivered: 28th February 2013

Husband marital power – exercise of marital power where there is private or voluntary separation – possession – agreement of parties in relation to matrimonial assets binding between themselves and not creditors- keeping of merx does not necessarily mean possession.

Summary: The plaintiff has instituted action proceedings, for a return of a motor vehicle from defendant. The said merx came into the possession of defendant by reason that it was left by plaintiff's estranged wife.

[1] The background to this action is briefly that the plaintiff and defendant's sister contracted a civil rites marriage in 1988. The marriage was in community of property. In 2008 the couple separated following their restrained relationship. It is common cause that during their separation, the plaintiff's wife kept with her the motor vehicle which is now contended. In 2010, the plaintiff's wife, in search for greener pastures left the country, leaving the said motor vehicle to the custody of defendant.

[2] Applicant claims that as the motor vehicle forms part of the matrimonial assets and owing to the principle that as the head of the family he is endowed with the marital power over matrimonial property, the motor vehicle should be in his possession.

[3] The issue for determination is whether applicant is entitled to the return of the merx.

[4] Addressing this issue, defendant avers at paragraph 7.21 and 8 of the answering affidavit:

"7.21 I have been advised also that since the applicant and his wife are separated, each party is not entitled to demand to take into his or her possession whatever assets are in the custody or possession of the other, especially because they had

agreed that the wife should have custody and possession of the motor vehicle for her own use.

8. *Ad Paragraph 13 and 14*

Contents therein are denied. I humbly submit that I cannot release the motor vehicle to applicant or unless my sister instructs me to do so, as she is entitled in law to have use of the motor vehicle especially since she is separated from the applicant, who has in his possession two other motor vehicles belonging to the joint estate.”

[5] In his replying affidavit, applicant avers at his paragraphs 8, 10, 14.1, 14.2, 16.3, 20

“8. *The respondent has in his papers alleged that he was granted permission to use the motor vehicle by my wife. The respondent has further alleged that we are currently in separation with my wife, allegations which I deny.*

10. *The respondent has in his answering affidavit, pointed out that by virtue of my alleged separation with my wife, each spouse is entitled to keep whatever asset is in his or her possession, I submit that the respondent’s allegations are bad in law and fall to be dismissed with costs as same are not merited and have no legal basis needless to say that I deny that I am in separation with my wife.*

14.1 *The allegations contained in these paragraphs are denied as if specifically traversed. In particular, I deny that the respondent was authorised by my wife to keep possession of our motor vehicle. Even if he was, which is denied, this was done behind my back and without my authority as owner and administrator of our marital estate.*

14.2 *I further deny that I am in separation with my wife nor have I caused any breakdown to my marriage. If anything such allegations are unsubstantiated and more so scandalous of me and at the hearing of the matter I will apply that same be struck out with costs.*

16.3 *Furthermore, I still reiterate that I am not in separation with my wife nor is the respondent entitled in law to retain possession of my assets or an asset that form part of my marital estate.*

20. *Ad Paragraph 12*

I deny that we are living separate lives with my wife and can confirm that my marriage to my wife still subsists hence I am entitled to return of the motor vehicle.”

[6] The above repeated averments by applicant indicate that applicant insistently and vehemently denies that he is in separation with his wife. However, this flat denial of the separation by applicant flies directly to his very face as I hereunder demonstrate.

[7] Applicant in his founding affidavit at paragraph 10 deposes:

“10. On or about 2010, my wife was offered a job in Zimbabwe, which she duly accepted. She therefore resigned from the employ of the Swaziland Government as civil servant and relocated to Zimbabwe even though I had not consented to her relocation. She has since moved from Zimbabwe to settle in Tunisia where she is currently employed by the African Development Bank. At the time my wife relocated to Zimbabwe, our marriage was experiencing problems hence we were living separately. However, I had made a decision to allow her to use the motor vehicle because our marriage still subsists and she needed it for the purposes of moving from point “A” to “B”.”

[8] For the reason that by applicant’s own demonstration at his founding affidavit that he is in separation with his wife, the averment in his reply that he is not in separation with his wife stands to be rejected. I therefore accept that the said applicant and his wife are in separation.

[9] I must state as further common cause that the said motor vehicle, Nissan bakkie 2006 model registered SD 171 EG came into the hands of the respondent in the manner described by applicant in his paragraph 17 of the founding affidavit viz.:

“17. It suffices to state that when our elder son left for the Republic of South Africa before leaving for Malaysia to

pursue his tertiary education, my wife instructed him to leave the said motor vehicle with the respondent.”

[10] Having determined from applicant’s own averments that there was a separation between his wife and himself, I now turn to view authorities on the consequences of matrimonial property of spouses who are under separation.

[11] In his paragraph 10 which is not disputed, applicant informs:

“At the time my wife relocated to Zimbabwe, our marriage was experiencing problems hence we were living separately. However, I had made a decision to allow her to use the motor vehicle because our marriage still subsists and she needed it for the purposes of moving from point “A” to “B”.”

[12] One infers that the applicant and his wife were in voluntary or private separation.

[13] Discussing property rights of the parties under such separation **De Villiers C. J.** in **Scholz v Felmore (1886) 4 SC 192** at 194 held:

“The general rule no doubt is, that a voluntary deed of separation between parties is binding as between those parties, but that it does not affect the rights of creditors ...”

[14] **H. R. Hahlo, “The South African Law of Husband and Wife, 4th Ed. at page 355** writes:

“Thus an agreement that the joint estate is to be divided or that the wife is to receive back whatever she has brought into the marriage will be upheld.”

[15] In essence, the learned **Chief Justice De Villiers** *supra* and author **H. R. Hahlo** are authority to the effect that our courts will recognise agreements concluded by spouses who have separated irrespective of a judicial separation order.

[16] It would appear that the honourable **Judge Foxcroft J. A.** in **Sandile Xavier Frances Dlamini v Bhekiwe Dlamini (born Hlophe)** had this principle in mind when he ruled at page 8:

“If she had established on papers before court a quo that it had been agreed that both husband and wife were to leave the former matrimonial home, then the husband would have had no greater right to possession of that home than she.”

[17] The above calls for me to recognise as a valid contract between applicant and his wife the position as appears at paragraph 10 of applicant’s founding affidavit:

“However, I had made a decision to allow her to use the motor vehicle because our marriage still subsists and she needed it for the purposes of moving from point “A” to “B”.”

[18] Having determined that there is a deed arising out of their separation, it is trite therefore that the applicant cannot in law and as of right claim the return of the said motor vehicle without having to first repudiate the deed.

[19] Applicant's marital power over the merx terminated upon the conclusion of the deed of separation as reflected in his founding affidavit paragraph 10 *supra*.

[20] Further from the legal definition of possession, that the said motor vehicle is in the hands of respondent it does not necessarily translate into defendant having possession. I mention this from the undisputed assertion by respondent at his paragraph 11 which reads:

“As I have stated in the preceding paragraphs, I am exercising custody or in possession of the motor vehicle on behalf of applicant's wife and is being used by myself to run her errands in the country whilst she is abroad, and she will continue to use it herself when she returns to the country.”

[21] From the above unchallenged averments by defendant, one may infer that the applicant's wife is in possession of the merx although defendant is keeping it.

[22] In the totality of the foregoing, the following orders are entered:

1. Applicant's application is dismissed.
2. Costs to follow the event.

M. DLAMINI

JUDGE

For Applicant : Mr. B. Mndzebele

For Respondent : Mr. N. Manzini