



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 1516/13

In the matter between

SWAZI WIRE INDUSTRIES (PTY) LTD

APPLICANT

And

TURBO DIESEL (PTY) LTD

1ST RESPONDENT

VICTOR BARREIRO

2ND RESPONDENT

ALLISON BARREIRO

3RD RESPONDENT

Neutral citation: *Swazi Wire Industries (Pty) Ltd v Turbo Diesel (Pty) Ltd
& 2 Others (1516/13) [2014] SZHC 147 (17 July 2014)*

Coram: M. S. SIMELANE, J

Heard: 11 APRIL 2014

Delivered: 17 JULY 2014

Summary: Civil Procedure – *rei vindicatio* application – dispute of facts – application dismissed.

Judgment

SIMELANE J

[1] This is an application per *rei vindicatio* wherein Applicant contends for the following:-

1. Ordering the First Respondent to deliver to the Applicant a SUBARU motor vehicle bearing:-
 - 1.1 Registration number HSD 491 BH.
 - 1.2 Chassis number SG 5006321
 - 1.3 Engine Number B513441
 - 1.4 Description Sedan
 - 1.5 Year 2000
2. Authorizing and directing the deputy sheriff in whose area of jurisdiction the motor vehicle may be found to attach the same and to deliver the motor vehicle to the Applicant.
3. Ordering the Respondents to pay the costs of this application.

4. Granting the Applicant such further and or alternative relief.

[2] The Applicant claims ownership of the said motor vehicle on the following grounds.

3.1 The motor vehicle was bought from Waves Motors by the Applicants as per Annexure “C” which is a cleared cheque dated 6th August 2013. Prior to the Applicant buying the Motor Vehicle it had been issued with a quotation marked “E”.

3.2 Mr. Zafar Iqhal the director of Waves Motors has filed a confirmatory affidavit and states that it is the Applicant that bought the Motor Vehicle on the 6th August 2013 which was bought through Wayne Rudd. Mr. Iqhal goes on and states that he then issued a receipt to Mr. Rudd to that effect on the basis that he was the bearer of the cheque.

3.3 Mr. Rudd filed a confirmatory affidavit and states under oath that he was employed by the Applicant as a salesman and that he was instructed by the Applicant to buy the motor vehicle for it. According to Mr. Rudd, he bought the vehicle for the Applicant to be used by him in his position as a salesman and he used the Applicant’s funds to pay for it. See Annexure “C” founding affidavit of Dale Allen confirmatory affidavit of Mr. Iqhal and Mr. Rudd.

- [3] The Respondents have argued that the purchase price of the motor vehicle was paid by Mr. Rudd from the money that he defrauded them. They also argue that the invoice is written in the name of Mr. Rudd and therefore the latter is the owner.
- [4] The Respondents argue that there is a clear dispute of fact on whether or not the Applicant is the owner of the vehicle in issue. The Respondents further contend that the Applicant seeks to prove the ownership of the vehicle through the registration documents “Annexure “A” which reflects that the owner of the vehicle is Waves Investments (Pty) Ltd. This fact is further reinforced by annexure “VB3” page 58 of the Book of Pleadings wherein Magagula Attorneys in submitting a letter of demand to the Respondents claimed that the vehicle belongs to Waves Investments. The Respondents deny that the Applicant is the owner of the vehicle.
- [5] The Respondents further submit that Wayne Rudd alleges that the vehicle belongs to him. Annexure “VB5” are SMS between Wayne Rudd and the 2nd Respondent where Rudd confirms that the vehicle belongs to him.
- [6] The Respondents argue that there is a clear dispute of fact as to who the owner of the vehicle is and coupled with the denial of ownership by the Respondents that the Applicant is the owner of the motor vehicle there is no way that ownership can be determined on the papers as they stand.

- [7] It is Respondents' contention further that the Applicant seeks to explain how it came to be the owner of the vehicle. In that regard the Applicant alleges that annexure "E" is a quotation and annexure "B" at page 26 of the Book of Pleadings is a receipt. The Applicant seeks to explain these documents on affidavit but this is not permissible. The Respondent contends that the documents must speak for themselves.
- [8] On the issue of Possession, the Applicant alleges that the Respondents are in possession of the motor vehicle. On the contrary the Respondents submit that the motor vehicle is in the possession of Autohaus Holdings (Pty) Ltd. The Applicant argues that there is no company registered in Swaziland as Autohaus Holdings (Pty) Ltd.
- [9] I am inclined to agree with the Respondents that there are serious disputes of fact on the ownership of the motor vehicle that is on whether the motor vehicle is for the Applicant or is for Wayne Rudd.
- [10] There is also a dispute on what annexures "E" and "B" are. This can only be resolved through oral evidence.
- [11] Another dispute is on who is actually in possession of the motor vehicle. Is it with the 1st Respondent or in the possession of Autohaus Holdings (Pty) Ltd.?
- [12] The law on the question of disputes of fact has been settled in Swaziland. The learned authors **Herbstein and Van Winsen** in the

text, the Civil Practice of the Supreme Court of South Africa 4th edition page 224 postulated this position of the law as follows:-

“It is clearly undesirable in cases in which facts relied upon are disputed to endeavor to settle the disputes of fact on an affidavit, for the ascertainment of the true facts is effected by the trial Judge on consideration not only of probability, which ought not to arise in motion proceedings but also of credibility of witnesses giving evidence viva voce. In that event it is more satisfactory that evidence should be led and that the court should have the opportunity of seeing and coming to a conclusion.”

[13] This trite principle of law has been restated in this jurisdiction in a plethora of case. These include but are not limited to the following; **Daniel Didabantu Khumalo v The Attorney General Civil Appeal No. 31/2010, Pauline Mnguni v City Jap Auto (Pty) Ltd and another Case No. 4728/09, Hlobisile Maseko (nee Sukati) v Sellinah Maseko (nee Mabuza) and others Case No. 381/10.**

[14] I am of the considered view that this matter cannot be resolved on the papers before me. There is need for *viva voce* evidence to be called in these circumstances.

[15] On these premises, I order as follows:-

- (1) That the parties be and are hereby referred to oral evidence on the following issues:-
 - (a) Who the owner of the motor vehicle is.?
 - (b) Who is in possession of the motor vehicle.?
 - (c) What annexures B and E are.?
- (2) The Applicant shall pay the Respondents costs of this application.

M. S. SIMELANE
JUDGE OF THE HIGH COURT

For the Applicant: Mr. N. Piliso

For the Respondents: Mr E. J. Henwood