



**IN THE HIGH COURT**

**OF SWAZILAND**

**JUDGMENT**

Case No. 76/2015

In the matter between

**ROSEMARY DOS SANTOS**

**Applicant**

**And**

**LYNETTEE FRAZER  
WILLIAM KELLY**

**1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent**

In re:

**LYNETTE FRAZER**

**Plaintiff**

and

**ROSEMARY DE SOUZA**

**Defendant**

**Neutral citation:** *Lynette Frazer vs Rosemary De Souza (76/2015)*  
[2015] SZHC 132 (16 April 2015)

**Coram:** **MAMBA J**

**Heard :** **16 April 2015**

**Delivered:** **16 April 2015**

[1] Civil Law – action, judgment and writ of execution granted against X but Deputy Sheriff attaching property owned by Y. Application for release of property by Y granted.

[1] By urgent notice of application dated 9 April 2015, the applicant sought an order inter alia, that :

‘(a) Applicant’s motor vehicle (Nissan Tiida) should be released by the 2<sup>nd</sup> Respondent and be returned to her [ie Applicant].

The matter was set-down for hearing on 15 April 2015 and was opposed by the respondent. However, only the first respondent filed her opposing affidavit and the matter was argued before me on 16 April 2015.

[2] The salient facts are largely common cause herein and they are as follows:

2.1 On 23 January 2015, the first defendant issued summons against the defendant for the payment of the sum of E30, 256.50 and other ancillary relief.

2.2 The return of service by the Deputy Sheriff stated that the summons was served at “...Zakhele in the Manzini region at the Defendants personal homestead ... upon the defendant personally.’ This was on 26 January, 2015. The name of the defendant in the return of service is given as Rosemary De Sauza.

- 2.3 There was no Notice of Intention to defend the action filed and the plaintiff applied for and was granted judgment by default sometime in March 2015. (The exact date is not stated in the court record).
- 2.4 The default judgment was followed by a writ of execution against the movable property of the defendant. However, the Deputy Sheriff attached the applicant's motor vehicle referred to in paragraph 1 above and this has prompted this application.
- 2.5 The applicant has stated under oath that she is Rhona Rosemary Dos Santos and not Rosemary De Souza who is the defendant in the main action and the judgment debtor. She argues that she was not a party to that action and the writ does not concern her but the defendant. She has annexed her National Identity Card bearing her personal particulars in support of this.

[3] The first respondent in her opposing papers states that the applicant introduced herself to her as Rosemary De Souza and therefore, she insists that the attachment of the applicant's motor vehicle was proper and the summons and writ of execution are equally proper. The first respondent also states that she has had many dealings with the applicant in the past and has always known her as Rosemary De Souza. She also reveals that she knows the applicant as a bad debtor who, in the first place, borrowed the money in question from her in order to pay her debts regarding the

motor vehicle in question. First respondent also makes the point that after the attachment of her vehicle, the applicant approached her and paid a sum of E10,000.00 and asked her to release her motor vehicle. She says this was a clear acknowledgment of debt and who the judgment debtor is in this case.

- [4] The applicant states that indeed she owed the first respondent a sum of E10,000.00 and she paid this amount on the mistaken belief that the writ was indeed against her. The applicant denies ever introducing herself to the first respondent as Rosemary De Souza. Applicant further states that she is closely related to the first respondent as the first respondent's brother-in-law is married to her, (i.e applicant's) daughter.
- [5] Despite the clear identity document stating the name of the applicant, the first respondent has not applied for an amendment of the name of the defendant, if indeed she intended suing the applicant herein.
- [6] The order and the writ of execution is of course proper and valid as against Rosemary De Souza. They are, however, invalid as against the applicant, Rosemary Dos Santos.

[7] This Court cannot *mero motu* effect this amendment. The only option to the court in the circumstances is to allow the application with costs and it is so ordered.

**MAMBA J**

**For the Applicant :**

**Mr J.M. Mavuso**

**For the first Respondent:**

**Mr. T. Bhembe**