



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 119/15

In the matter between:

BHEKI SHONGWE

Applicant

AND

CONTOUR BEDDING SWAZILAND LIMITED

1st Respondent

MUSA SUKATI N.O.

2nd Respondent

In Re:

CONTOUR BEDDING (SWAZILAND) LIMITED

Plaintiff

AND

B COM INVESTMENTS t/a B COM FURNITURE

1st Defendant

THEMBINKOSI MDLULI

2nd Defendant

JABU MDLULI

3rd Defendant

BONGEKILE MDLULI

4th Defendant

Neutral citation: *Contour Bedding Swd Ltd v Bcom Investments (119/15)*

[2016] SZHC 71 (12 April 2016)

Coram: FAKUDZE, J

Heard: 06 April 2016

Delivered: 12 April 2016

Summary: *Civil Procedure – Rei vindicatio – party seeking same must establish that the said party is the owner of the property sought to be vindicated; and (b) that it was in the possession of the defendant at the commencement of the action – registration of a motor vehicle in the name of an individual constitutes prima facie evidence of ownership in the absence of extrinsic evidence to the contrary. Application upheld with costs.*

JUDGEMENT

[1] On the 16th October 2015, Applicant filed an Application, on a certificate of urgency, seeking the following -

1. Dispensing with the Rules relating to motion proceedings in forms, time limits and service as are required by the Rules of the High Court and that the matter be heard as one of urgency.
2. Condoning Applicants non compliance with the Rules of the above Honourable Court.

3. Directing the 2nd Respondent to deliver forthwith to Applicant and/or his Attorneys the motor vehicle wit:

MAKE: MAZDA

MODEL: 2007

CHASSIS NUMBER: AFADXXMJ 2D 66017

ENGINE NUMBER: WLAT 749269

REGISTRATION: MSD 613 BH

DESCRIPTION: LDV

4. That prayer 3 operates as a rule nisi with immediate effect returnable at a date to be determined by the above Honourable Court.
5. Costs of suit.
6. Granting Applicant further and/or alternative relief.

[2] A Notice of Intention to Oppose the Application was filed by 1st Respondent on the 6th October, 2015. He also filed a Notice to Raise Points of Law. These points related to the urgency of the matter, the existence of dispute of facts and the failure to satisfy the requirement for the granting of an interdict. When the matter appeared before court on the 8th December 2015, the presiding judge ruled that the matter be dealt on its merits. 1st Respondent was ordered to file his Answering Affidavit by the 14th January, 2016 and Applicant to file his reply on the 18th January, 2016. Heads of Argument and the Book of pleadings were to be filed by the 25th January 2016.

[3] The matter was postponed on various occasions until it was finally heard on the 6th April 2016.

APPLICANT'S CASE

- [4] Applicant's case is that he is the owner of the aforementioned vehicle by virtue of an agreement of sale that was entered into sometime in February, 2015 between himself and one Bongekile Mdluli, who is Fourth Defendant in the main action.
- [5] Evidence of the sale is the copy of the "blue book" which evidences that the said motor vehicle was registered in Applicant's name in September, 2015. This copy is attached to the Application and is marked "BSI."
- [6] Applicant further alleges that he believes and has been advised by the 2nd Defendant in the main matter that the 1st Respondent issued summons against him and others before the above Honourable Court and an Order was granted on the 10th September, 2015. Pursuant to that Order granted, the 2nd Respondent acting on a purported warrant of execution, attached the aforesaid motor vehicle while in the possession of the 2nd Defendant in the main action. The purported attachment warrant is also attached and marked "BS2."

- [7] Applicant states that he is not privy to the facts of the main action nor has any interest in it save to say that what has been attached by the 2nd Respondent has nothing to do with him in the matter. Applicant states that the motor vehicle came to be in possession of the 2nd Defendant for the use of same wherein he wanted to travel to the Republic of South Africa. The intention was that when the vehicle comes back, it will be restored to its rightful owner. Such could not happen because 2nd Respondent then attached it in execution of the warrant of execution issued by this court.
- [8] Applicant has filed confirmatory affidavits of Thembinkosi Mdluli and Bongekile Mdluli to substantiate his claim.

RESPONDENT'S CASE

- [9] 1st Respondent contends that for Applicant to hold them bound for the return of the said motor vehicle, Applicant must not just make a bare allegation that he bought the motor vehicle described above from Bongekile Mdluli on or about February, 2015 as stated in paragraph 6 of the Founding Affidavit. Applicant is bound to plead the contract of sale in terms of Rule 18 which he has failed to do. 1st Respondent further contends that his purported contract of sale relating to the *merx* is an essential link in the chain of his cause of action. 1st Respondent has cited the case of **Thembisile Khanyisile Bhiya v Jabulile Persis Maziya and 3 Others High Court Case No. 3778/08** in support of his proposition.

[10] 1st Respondent avers that the registration document, which is the blue book, even though it reflects the name of the Applicant, is not positive proof of ownership and cannot be regarded to have such attributes. 1st Respondent further avers that in the case of **Jerry Dumsane Nxumalo v Nelson Lokotfwako N.O and 2 Others (235/2011) 2013 SZHC 222**, the court held that in as much as the blue book was in Applicant's name, this was not conclusive proof of ownership. Proof of ownership is quite a different kettle of fish altogether.

[11] 1st Respondent states that the date of the purported sale is February, 2015, but the Second and Fourth Defendants had at all material times been in possession of the motor vehicle. Respondent further states that 2nd Defendant made certain representations to the Second Respondent at the time of attachment. He told 2nd Respondent that the motor vehicle did not belong to him but to his wife (Fourth Defendant). Fourth Defendant was party to the proceedings in the main action.

[12] On the requirements of *rei vindicatio*, 1st Respondent argues that Applicant has failed to satisfy the requirement pertaining to that the *merx* must be in the possession of the Defendant at the commencement of the action. He cites the case of **Chetty v Naidoo 1974 (3) SA 20 AC** to support this point.

APPLICANT'S REPLY

[13] In reply, Applicant states that the issue of pleading a contract is neither here nor there for purposes of this Application. The subject for determination is *rei vindicatio* and not the contract of sale of the motor vehicle. Applicant further avers that if he used the wrong procedure in not pleading a contract, Rule 30 was open to Respondent to invoke or make use of.

[14] Applicant further states in reply, that the fact that a blue book is *prima facie* evidence of ownership has been decided by the Highest Court of the land in the case of **Mbhekwa Mthethwa v Winile Dube and Others SC Case No. 79/12**. 1st Respondent has not shown any evidence to the contrary to undo or rebut this *prima facie* element. Applicant's title to the motor vehicle remains unchallenged and hence it is not controverted.

[15] On the question of *rei vindicatio*, Applicant argues that he has satisfied the two requirements as indicated earlier in his submission. Applicant requests this court to find in his favour because 1st Respondent has not set any grounds acceptable in law to successfully oppose the Application.

THE APPLICABLE LAW

[16] The parties are *ad idem* that the issue for determination in this Application is *rei vindicatio*. The Learned Authors, **Silberberg and Schoeman, The Law of**

Property, Second Edition p. 291 have the following to say on the right to vindication:-

“An owner who has been deprived of his property against his will is as a general rule, entitled to vindicate it from any person.”

[17] The Learned Authors (supra) justify the principle when they say that -

“The principle that an owner cannot be deprived of his property against his will means that he is entitled to recover it from any person who retains possession of it without his consent.” See page 289.

[18] The rule that has just been adumbrated above was applied by His Lordship Jansen J.A. in the case of **Chetty V Naidoo 1974 (3) SA 20 A-C** as follows:-

“It may be difficult to define dominium comprehensively..... But there can be little doubt.... that one of its incident is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found, from whosoever is holding it. It is inherent in the nature of ownership that possession of the res should normally be with the owner unless he is vested with some right enforceable against the owner...”

[19] On the notion of ownership, the Learned Masuku J, in the matter of **Bonham V Master Hardware (Pty) Ltd t/a Build It and Others in Re: Master Hardware (Pty) Ltd v Nevil (294/08) [2009] SZHC**, observed at page 11 as follows:-

“According to this perception, ownership is the real right that potentially confers the most complete or comprehensive control over a thing which means that the right of ownership empowers the owner to do with his thing as he deems fit, subject to the limitations imposed by public and private law.”

[20] The issue of whether or not a blue book is *prima facie* evidence of ownership was discussed in the case of **Mbhekwa Mthethwa N.O. V Winile Dube and Others (Supra)** where the Learned **Maphalala M.C.B, AJ**, observed in page 7 that:-

“It is important that M.J. Dlamini in whose name the Nissan Navara is registered, should be heard and further cross-examined on the ownership of the motor vehicle; this is important when bearing in mind that the registration of a motor vehicle in the name of an individual constitutes prima facie evidence of ownership in the absence of extrinsic evidence to the contrary.”

[21] The requirements for a party to succeed in an application based on *rei vindicatio* are worth mentioning. The requirements are stated by **Silberberg and Schoeman** (supra) at page 289, in the following manner:-

“An owner who institutes the rei vindicatio to recover his

property is required to allege and prove no more than -

(a) That he is the owner of the thing - the burden rests upon the vindicator, in the absence on the pleadings of his title, to prove it.

(b) That it was in the possession of the defendant at the commencement of the action.”

COURT’S ANALYSIS AND CONCLUSION

[22] Having gone through the papers filed by the parties and having heard both counsel, this court wishes to confine itself to four issues – (i) the requirements for a party to succeed in *rei vindicatio* proceedings; (ii) the issue of ownership of a motor vehicle and proof of same; (iii) the issue of specifically pleading contract in *rei vindicatio* proceedings; and (iv) possession of the *merx* at the time the proceedings were instituted. As stated when this court was dealing with the applicable law, all that a party must prove to succeed in vindication proceedings is that (i) he is the owner of the thing that is being vindicated; and (ii) that it was in the possession of the defendant at the commencement of the proceedings.

[23] The parties are in agreement that the proceedings before this court pertain to *rei vindicatio*. 1st Respondent's position is made clear in paragraphs 8 to 10 of the Heads of Argument. Of particular relevance is paragraph 10 where 1st Respondent states that –

“10. Regarding the question of whether Applicant has satisfied the elements of rei vindicatio, it is 1st Respondent's contention that the Applicant has dismally failed on that score. The Applicant accordingly alleges that it derived its ownership from Bongekile Mdluli. The subject matter which is a motor vehicle is a movable. The derivative mode of acquisition on which Applicant relies is delivery.”

With the greatest of respect to 1st Respondent's counsel, this court has difficulty understanding Respondent's contention. All that Applicant has done is to prove ownership by virtue of *prima facie* evidence which is the blue book. Respondent has failed to rebut this evidence. All that Respondent has done is to educate this court on the modalities of transfer of ownership. This becomes clear when one reads paragraphs 11 to 17 of the Heads of Argument. All that an Applicant must establish in order to succeed in vindication proceedings is that he has ownership.

It is this court's humble view that Applicant has succeeded in proving the first element of *rei vindicatio*. Applicant has established that a sale of the motor vehicle took place in or around February 2015 and the change of ownership took place in or around September 2015. This court holds the view that since the contract was entered into in February 2015, there was conclusion of the same. The transfer of ownership was an administrative

formality to establish and confirm ownership. Respondent has not produce evidence to the contrary to counter Applicant's argument on this requirement.

[24] Applicant is not only required to prove ownership, he must also prove that at the time of the commencement of the proceedings to vindicate the *merx*, it was in the possession of the Defendant/ Respondent. Applicant has proved that the motor vehicle, which is in the centre of this dispute, was in the possession of 2nd Respondent who is the Deputy Sheriff. The motor vehicle is in the possession of the Deputy Sheriff on the instruction of 1st Respondent. He has satisfied the second requirement of *rei vindicatio* as well.

[25] Respondent's counsel argues that the ownership of the vehicle is in dispute because even though the contract was concluded in February 2015, the fact that transfer took place in September 2015 is suspect. Respondent's counsel further argues that the purported sale and transfer of ownership was meant to frustrate the execution of the warrant of execution. This court begs to disagree with this line of reasoning on the basis that the contract of sale was concluded before the order or warrant of execution was issued out. It is important to note that the execution warrant or order was issued in or around the 10th September, 2015. It would therefore be wrong for this court to conclude that the sale of the motor vehicle was meant to stand in the way for the Deputy Sheriff to attach same.

[26] In further arguing the issue of ownership, Respondent's counsel alleges that the blue book is not conclusive proof of ownership. Counsel has quoted the case of **Dumsane Nxumalo v Nelson Lokotfwako (Supra)** where the Learned Judge in that case is alleged to have expressed this view. One thing Respondent's counsel is failing to appreciate is that in the **Dumsane Nxumalo's** case, the Application pertained to a return of a motor vehicle on the basis that the said *merx* was a subject of a hire purchase agreement. This does not hold true with respect to the present Application. Respondent's Counsel is also failing to appreciate that there is a difference between conclusive proof of ownership and prima facie proof of ownership. Conclusive proof cannot be disputed at all, whereas prima facie proof can be disputed by bringing evidence that proves otherwise. In the **Mbhekwa Mthethwa's** case (supra) which Applicant heavily relies upon, the Learned Justice of Appeal made it clear that the blue book is a *prima facie* evidence of ownership which can be rebutted by extrinsic evidence to the contrary.

[27] Respondent's counsel further avers that Applicant should have specifically pleaded the contract in the papers in terms of Rule 18. Applicant's Counsel has, in response, rightly argued that the purpose of this Application is not the issue of ownership but that of *rei vindicatio*. If there was contestation on whether an agreement of sale was entered into between the parties, 1st Respondent's argument would hold true. This court is inclined to agree with Applicant's submission on this point. The requirements for succeeding in a *rei vindicatio* application have already been canvassed in this judgment.

[28] Another issue that is worth commenting on is the possession of the motor vehicle by the 2nd Defendant at the time of its capture. 1st Respondent argues that the said motor vehicle “has at all material times been in the custody of the 2nd Defendant.” Respondent disputes the fact that the motor vehicle belongs to the Applicant. Applicant explains the circumstances under which 2nd Defendant happened to be in possession of the motor vehicle at the time it was captured by the Deputy Sheriff. In paragraph 10 of the Founding Affidavit, He says that “the motor vehicle came to be in the 2nd Defendant’s possession after we entered into an agreement with the Defendant for the use of same wherein he wanted to travel to the Republic of South Africa” In this court’s view what Applicant says holds water. It is unfeasible and unimaginable that Respondent was always in the business of monitoring the movements of the motor vehicle so as to conclude that the motor vehicle was at all times in the custody of 2nd Defendant. The question is how did Respondent come to know this?

[29] The analysis that has been made above leads me to conclude that Applicant has made a case for *rei vindicatio*. Prayers 1, 2 and 3 of the Notice of Motion are accordingly granted with costs.

FAKUDZE J

JUDGE OF THE HIGH COURT

For Applicant: M. Shongwe

For Respondent: B. Matsebula