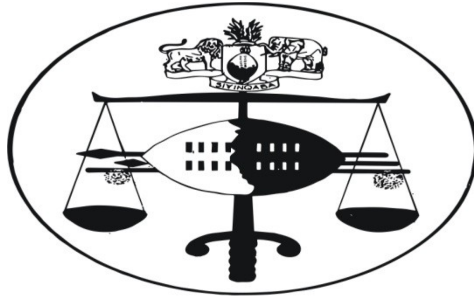

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **Case No. 2196/16**

In the matter between:

THEMBA DLAMINI	**Applicant**
VS	
AUTO DLAMINI	**1st Respondent**
THE NATIONAL COMMISSIONER OF POLICE	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**

Neutral citation:	*Themba Dlamini vs Auto Dlamini & 2 Others* (2196/16) [2016] SZHC 4 (30 January 2017)
CORAM	**MAMBA J**
HEARD:	**30 January 2017**
DELIVERED:	**30 January 2017**

[1] Civil Law and Procedure – application based on breach of oral agreement whose terms are sharply disputed.

[2] Civil Law and Procedure – urgent application. Disputes of fact arising – dispute irresoluble on papers and must have been foreseen by the applicant before embarking on application – no application for referral to trial on disputed facts. Application dismissed with costs.

[1] On a certificate of urgency, the applicant has applied for, *inter alia*, the following orders:

1. That the matter be heard as a matter of urgency in terms of rule 6(25) of the rules of this court.
2. That a rule nisi issue calling upon the 1st respondent to show cause on a date to be determined by this court, why the following prayers should not be granted or confirmed; viz;
3. he 'be ordered to handover the following motor vehicle and its Blue Book to the deputy sheriff of this Court, namely;

Make	Toyota Quantum 2.5D
Model	2013 Kombi
Engine Number	2KDA012103
Chassis Number	AHTSS22P307001792
Registration Number	ESD 561 BH
Colour	White

And

4. 'That the oral agreement *inter partes* should not be cancelled and the motor vehicle together with its registration book be returned to the Applicant.' There is also a prayer that the second respondent or his subordinates be authorised and or directed to assist the Deputy sheriff in the execution of the above orders.

[2] The bases or cause for the application is breach of an oral agreement of sale of the motor vehicle in question. The applicant states that in or about June 2016 he sold the vehicle in question to the first respondent for the sum of E260, 000. He avers further that it was a term of the agreement of sale that possession and delivery of the vehicle would be given to the first respondent once he had paid a sum of E200 000.00 of the purchase which the first respondent did on 20 September 2016 and the motor vehicle together with its blue book was delivered to him on that date.

[3] Applicant states further that the balance of E60,000.00 was to be paid in 6 monthly instalments of E10,000.00 with effect from 31 October 2016. The first respondent has, however, failed to pay any of such monthly instalments, the Applicant avers, and thus this application. This application, he says, follows upon ‘umpteen requests’ or demands made by him to the first respondent to honour his side of the contract or deal.

[4] The applicant, without any reference to a term of the alleged oral agreement, avers that he still owns the vehicle, simply because the first respondent has failed to fully comply with the terms of the oral agreement.

[5] The Applicant further states that he is being gravely prejudiced in his proprietary rights by the constant use of his vehicle by the first respondent in the circumstances. He avers that the vehicle undergoes depreciation each minute it is being used by the first respondent.

[6] It is also alleged by the Applicant that he fears that his vehicle may be attached by the creditors of the first respondent, believing that the vehicle belongs to the latter. Based on the above two allegations, namely; use and possible attachment, the applicant avers that this matter is urgent and should be heard as an urgent one.

[7] The application is opposed by the first respondent on the following broad and general grounds; namely;

7.1 It is not urgent or at least insufficient grounds of urgency have been stated by the applicant.

7.2 There are disputes of fact in the matter and these disputes are irresoluble on the papers.

7.3 A *rei vindicatio* application may not be granted to the applicant because, on his own showing, he passed transfer or delivery and ownership of the vehicle to the first respondent after the latter paid the sum of E200,000-00.

7.4 The first respondent is not indebted to the applicant at all.

8. The first respondent states that in or about June 2016, he advanced a sum of E60,000-00 to the applicant as a loan. The applicant advised him that he needed the money 'to purchase a permit styled and or belonging to Lokuhle Transport.' The following month, when the first respondent demanded payment of the loan, the applicant instead offered to sell him the motor vehicle in question, initially for a sum of E310,000.00 from which the said loan would be deducted. After negotiations, the applicant agreed or accepted a counter-offer for E210, 000-00 from the first respondent. Consequently the first respondent paid a sum of E150,000-00 to the applicant and it was agreed between the parties that the full amount of the loan aforesaid would be credited to the first respondent account with the applicant, ie, it would form part of the purchase price for the vehicle.

[9] To complete the story surrounding the sale, the first respondent states that after he had paid the purchase price (210,000.00), the applicant turned around and told him that an evaluation of the vehicle had placed its value at E250,000-00 and because of this he (applicant) demanded that the first respondent should pay to him an additional sum of E40, 0000-00. This, the first respondent refused and insisted that the agreed purchase price was E210,000-00 which he had already paid in full.

[10] From the above positions taken or allegations made by the parties herein, it is abundantly clear to me that the agreement of sale of the vehicle was oral. That much is common cause. What is not common cause, though, are the terms of the agreement. The parties are in sharp disagreement on the factual terms of such agreement. The dispute – on the terms and conditions of sale – goes to the root or core of this application. These disputes of fact cannot be untangled or resolved in this application. Apart from this, these disputes of fact were, in my judgment, clearly foreseen by the applicant before he filed this application. He should not have filed an application under the circumstances. An action would have been appropriate.

[11] No application has been made for a referral of the matter to oral evidence on the disputed facts and I doubt that it would have been successful in this case. For this reason alone ie disputes of fact – this application cannot succeed. It stands to fail and is hereby dismissed with costs.

[12] One further point perhaps deserves mention herein and it is this: Unless it is proved or established to the contrary, ownership in movables following a sale, passes to the buyer upon delivery or giving of possession of the merx to the purchaser.

[13] In *Machaka v Mosala (2664/2006) [2006] ZAFSHC 159 (19 October 2006)* Rampai J stated:

> '[10] The applicant contends that he is still the owner of the car. The applicant derived his ownership from a motor vehicle dealer in 1999. However, the respondent's contention is that she derived her ownership from the Applicant himself. The sedan is a movable. The derivative mode on which the respondent relies to have acquired ownership is delivery. The requirements for the passing of ownership by delivery include *inter alia*, that delivery must be effected by the transferor with the intention of renouncing and transferring ownership and such delivery must be taken by the transferee with the corresponding intention of accepting ownership.
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> **Concor Construction (Cape) (Pty) Ltd v Sanlam Bank Ltd 1993 (3) SA 930 (AD) at 933 A-B** per Milne JA
>
> [11] In the same case, *Concor (supra)* at 933 f-g Milne JA remarked:
>
> "It is clear, however, from the passage at 302 G-H and the reliance upon the judgment of Centlivres JA in *Commissioner of Customs and Excise v Randlers, Brothers and Hudson Ltd 1941 AD 369 at 411* that the legal

> transaction preceding the delivery may be evidence of an intention to pass and acquire ownership. Equally, the absence of such an agreement may, depending upon the circumstances, be evidence of the absence of any such intention."

Clearly in this case there was a sale and delivery of the motor vehicle to the respondent by the applicant and the intention in effecting such delivery was to pass ownership thereof to the first respondent, who, correspondingly accepted ownership thereof. Therefore, unless it is established to the contrary, ownership of the vehicle passed or was transferred to the first respondent when the motor vehicle was delivered to him, together with its registration documents. This is of course obiter in the context of this judgment.

MAMBA J

For Applicant: Mr. D. Hleta

For 1st Respondent: Mr Dlamini (Mabila Attorneys)