

**IN THE HIGH
COURT OF SWAZILAND**

JUDGMENT

HELD AT MBABANE

Case No. 935/2018

In the matter between:

THAMI SOKO

Applicant

And

NCEDI MAGAGULA

Respondent

Neutral Citation: Thami Soko v. Ncedi Magagula (935/2018)

[2018] SZHC 240 (1st November 2018)

Coram: J.S Magagula J

Date Heard: 18th October 2018

Date delivered: 1st November 2018

BACKGROUND

[1] This matter first came before me under certificate of urgency on the 26th June 2018. Both parties were represented and by consent time – lines for the filing of an answering and a replying affidavit were set.

[2] The Applicant sought substantive orders as follows:

“2. Directing respondent to restore to applicant possession of;

2.1 A VW Golf registration number YSD 372 BM;

2.2 A ladies bag with contents;

2.3 E11, 500 (Eleven Thousand Five Hundred Emalangeneni) in cash,

2.4 A lap top

2.5 A mobile phone.

3. That respondent pays the costs of the application.”

[3] The application was supported by a founding Affidavit of the applicant in which he inter alia states at paragraph 4 thereof:

“ On the 20th June 2018 I was driving a VW Golf registration number YSD 372 BM belonging to Nosimilo Nxumalo. I parked the said motor vehicle at Manzini Rank and left the keys in the motor vehicle. When I returned to drive away I found respondent in the

motor vehicle on the driver's seat and he ordered that I seat on the passenger seat and we drove off to Swaziland Interstate Taxi Association where the respondent stated that he was attaching the motor vehicle because he said I owed him money.”

- [4] Applicant further states in paragraph 5 of his founding Affidavit that in the motor vehicle there was a ladies' handbag with contents, a lap top, a mobile phone, E11,500 in cash and other items.
- [5] In paragraph 6 of his affidavit Applicant admits that respondent did advance him a sum of E20,000-00 at some point in time but maintains that he repaid respondent this money. Respondent was now demanding interest on the said sum of E20,000-00. However respondent failed to disclose the amount of the interest he was demanding.
- [6] Applicant further alleges in paragraph 7 of his affidavit that he eventually left respondent at the Swaziland Interstate Taxi Association as he had to collect a child from school. He also left the car and at the said offices there was also Applicant's brother Nhlanhla Soko who got involved in the discussions concerning the interest claimed by respondent. When Applicant returned from collecting the child he found that the respondent had left with the car. Applicant later

received a telephone call from his elder brother Vusi Soko who informed him that the car was at Mafutseni police station. Applicant indeed found the car at the said police station but the respondent had left with the keys. One Sergeant Mavuso at the police station told applicant that the police had no interest in the matter but were merely keeping the car for the respondent.

[7] In paragraph 9 and 10 of his founding affidavit applicant states that he was in peaceful and undisturbed possession of the motor vehicle and respondent unlawfully dispossessed him of same. Despite lawful demand respondent refuses to return the motor vehicle to the applicant. Further and in paragraph 11 of his affidavit applicant submits that respondent has taken the law into his hands by unlawfully dispossessing him of the motor vehicle, without a court order or applicants consent. Applicant therefore seeks the relief claimed.

[8] The respondent deposed to an opposing affidavit in which he maintains that the applicant is indebted to him in the sum of

E20,000-00. He further maintains that applicant left the motor vehicle at the offices of Swaziland Interstate Taxi Association when he went to collect the child but never returned. He therefore could not

leave the motor vehicle unattended hence he drove it away. He does not deny however that at the Manzini bus rank he took charge of the motor vehicle without the consent of the applicant and that he actually ordered the applicant to sit in the passenger seat. Respondent further does not allege that he ever offered the keys of the motor vehicle to the applicant at any point in time after he forcefully took control of the car at the bus rank.

- [9] The respondent further alleges that the applicant actually voluntarily left the motor vehicle with him and that he has not refused to handover the car back to applicant. However at the same time he filed an affidavit opposing the application for release of the car to the applicant and appeared in court by counsel to oppose it.

From the foregoing I was convinced that the respondent is actually playing games and abusing court process. In the result on the 4th July 2018 I granted an order that respondent should return the motor vehicle to the applicant. He defied the court order until contempt proceedings had to be instituted where after he complied with it.

- [10] Although he had agreed that he had possession of the motor vehicle, respondent denied ever seeing the items which applicant said were in it. In fact he went on to state that before applicant left to collect the

child he took some items from the motor vehicle. The import of this statement was obviously meant to be that applicant actually removed the said items from the car.

ORAL EVIDENCE

[11] Since there was now a sharp dispute of fact regarding whether the said items were actually left in the car by the applicant I referred this part of the claim to oral evidence. However before the date of hearing of oral evidence the respondent actually delivered all the contents of the motor vehicle at Swaziland Interstate Taxi Association. These items included all those claimed by the applicant as well as others not specifically mentioned in the application. It is only the money in the sum of E11,500-00 that was not returned and which respondent persists in denying. When oral evidence was eventually led, this was the only item in dispute and which has still not been returned by the respondent.

[12] The applicant gave oral evidence in which he confirmed that the sum of E11,500-00 was also in the car. He told the court that the money actually did not belong to him. He said he had been asked by Sizwe Hleta, who is a mechanic at his brother's place to buy motor vehicle

parts with the money in South Africa since he was going there. He said the parts were for a Volkswagon Mini Bus and they included a turbo charger. The money had been given to him that very same morning and he kept it in the armrest of the car.

- [13] Applicant further explained that he had gone to the bus rank to give some documents to his driver. He alighted from the car leaving the engine running and went to speak with his driver. He further states:

“ As I was speaking to my driver Ncedi got into my car on the driver’s seat. When I approached him he said I should get on the passenger seat as he wanted to take me somewhere. The money was at the arm rest of the car. I got in and we went to the interstate offices.....From the time he took control I never drove the car nor did I get the keys.”

- [14] Applicant further states in his evidence that at the interstate offices they found his brother Nhlanhla Soko and Bambumuzi Sithole. Respondent told these two that he was taking the car from applicant since applicant owed him money. These gentlemen tried to discourage respondent from taking the car. A long conversation ensued until it was time for applicant to go and collect a child from school. When applicant wanted to use the car the respondent refused until he had to

borrow a car from a friend. Upon his return from school applicant did not find respondent there nor did he find the car. He only got the car some two months later and pursuant to a court order.

[15] Although the motor vehicle was taken by the respondent with its contents on the 20th June 2018, the contents were only delivered at the interstate offices on the 5th July 2018. The money was of course not returned.

[16] During cross – examination applicant denied ever having access to the car after respondent took control of it. He said he asked for the car keys but respondent refused. He was asked if he informed respondent that there was money in the car and he replied in the negative. In re – examination it however transpired that applicant never told respondent what items were in the car.

[17] It was further suggested in cross – examination that there was no way applicant could leave so much money in an unlocked vehicle at the bus rank. Applicant maintained that the money was in the car and it was not possible for one to see the money unless he was in the car.

[18] Sizwe Hleta was called to testify and he confirmed that on the 20th June 2018 he gave the sum of E11,500-00 to applicant. He had requested him to buy a turbo charger at Mr Turbo and Turbo Toys in

Johannesburg. He further stated that he never received the turbo charger nor did he receive his money back. This witness was not cross – examined.

[19] On the date fixed for the respondent to present his side of the story he did not show up and his legal representative closed his case.

ANALYSIS OF THE EVIDENCE

[20] I must say that in cases of this nature it is quite difficult to find out the truth. Where a person forcefully dispossess someone of a motor vehicle or forcefully enters someone's house it is highly possible that the owner or occupier thereof will allege that there were all sorts of valuables in there solely for the purpose of getting back to such intruder. At the same it is also possible that indeed there was such property which was taken by the intruder. The court must however do its best to come to a conclusion based on the evidence before it.

[21] *In casu* there is consensus that the respondent took control of the applicant's motor vehicle at the Manzini bus rank. Applicant had to take the passenger seat and respondent drove the motor vehicle to the interstate offices where discussions were held. It is respondent's case that he took the motor vehicle because applicant owed him money. In

other words he wanted money from the applicant. From respondent's conduct it is clear that he wanted to get the money by any means possible; whether lawful or otherwise. This suggests to me that if indeed the money was in the car he would definitely take it.

[22] Secondly, when applicant stated what items were in the motor vehicle the respondent denied that there were any such items in the car. However he later delivered all the items at the interstate offices except the money. This evidently casts a serious doubt on his credibility as a person who tells the truth. It raises a high probability that the money was also there.

[23] The applicant has given a full account of how he came to keep so much money in the car. He states that the money had been given by one Sizwe Hleta for the purpose of buying motor vehicle parts in South Africa where applicant was going. The said Sizwe Hleta has indeed confirmed that he gave the money to the applicant that very same morning and for the said purpose. The respondent has not given any oral evidence to controvert what the applicant is saying.

[24] In cross examination however it was suggested to the applicant that there was no way he could keep so much money in an unlocked vehicle at bus rank. Applicant maintained that the money was hidden.

In any event it is not disputed that there were other eye-catching items in the car such as a laptop and a ladies' handbag. Although we are not told where exactly these items were, there has been no suggestion that they were also hidden. In fact respondent's evidence would possibly have revealed this but unfortunately he did not give any evidence.

[25] The other thing concerning keeping so much money in an unlocked vehicle at a bus rank is that there is no evidence indicating how far the applicant was from the motor vehicle. Applicant says he alighted from the vehicle leaving the engine running. He further states that as he was talking to his driver he saw respondent entering the car on the driver's seat. This suggests to me that applicant was quite close to the vehicle such that there was no real risk in him leaving the car unlocked and the engine running.

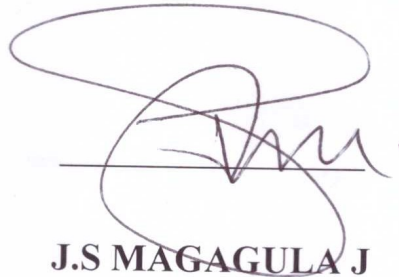
[26] There is also the aspect of applicant not telling the respondent that there was money in the car. There could be many reasons why applicant decided not to divulge such fact. The respondent wanted money from the applicant he could have feared to tell respondent that there was money in the car as he would definitely grab such money.

[27] From the foregoing analysis it seems to me quite probable that the said sum of E11,500-00 was indeed in the motor vehicle and that

respondent took it, and after getting it decided to return the other contents of the car.

[28] For the foregoing reasons the following order is made:

- a) The respondent is directed to pay the sum of E11,500-00 (Eleven Thousand Five Hundred Emalangeneni) to the applicant.
- b) Costs of suit.
- c) That execution for recovery of the laid sum shall issue in terms of the rules of court should respondent fail to pay.



J.S MAGAGULA J

For Applicant: B.J Simelane

For Respondent: Z. Magagula