
IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 884/2020

In the matter between:

DUMSANI THWALA

APPLICANT

and

.. ZANE:LE THWALA (NE:E D
LAMINI).

1st RESPONDENT

COMMISSIONER OF

2nd RESPONDENT

POLICE ATTORNEY

3rd RESPONDENT

GENERAL THAMSANQA

4th RESPONDENT

MNTSHALI

*Neutral citation: Dumsani Thwala vs Zanele Thwala (Nee Dlamini)
(884/2020) SZHC 162 [2020] (11/08/2020).*

Date heard : 18/05/2020; 27/05/2020 and 02/06/2020

Date delivered : 11/08/2020

Summary : *Civil Law - Application for Restitution of certain properties in Marital Estate - Dissolution of marriage and ancillary proprietary consequences: Parties married by traditional Swazi customary inter-Application also taking form of spoliation relief:*

Respondent conceding only to interdict against disposal of marital assets pending defamatory of proceedings before the traditional authorities.

JUDGMENT

Background.

[1] In this matter the facts are not complicated. The Applicant is a spouse of the 1st Respondent to whom he is married in terms of Swazi Law & Custom.

They are experiencing marital difficulties and are currently separated pending resolution of their marriage under customary rules.

[2] In this application the applicant seeks an urgent albeit final mandatory interdict compelling the 1st Respondent to return to the possession of the applicant two motor vehicles described in the papers as:

1) a Foden Truck Reg:QSD 486 CM
Chassis No.SFNA36MC14911622
Engine No. IFME35083787 and;

2) a Mercedes Benz Sedan Reg.no.KSD 197 AS
Chassis No.WDB211652A085581
Engine No.11294931334418.

- [3] Applicant further seeks an interlocutory interdict pending the finalization of the parties dissolution of marriage proceedings at the uMphakatsi of eLwandle (Elwandle Royal Kraal).

That the 1st Respondent or whosoever is in possession thereof to forthwith hand over and/ or return to the possession of the applicant the two movable properties belong to the applicant's estate as fully described herein under;

A) MAKE : TRUCK FODEN
REGISTRATION NO : QSD 486 CM
CHASSIS NO. : SFNA36MC14F911622
ENGINE IFME35083787
COLOUR BROWN

B) MAKE_ MERCEDES BENZ SEDAN
REGISTRATION NO. KSD 197 AS
CHASSIS NO. : WDB211652A085581
ENGINE NO. : 11294931334418
COLOUR : SILVER

The rest of the prayers are procedural and not substantial in nature.

- [4] The application was initially opposed by the 1st Respondent (the wife of the applicant) although she belatedly and reluctantly filed her opposing affidavit after the dates set for the filing of an answering affidavit. This however, is now academic by reason of the 1st Respondent capitulation and concession to the applicant's claims albeit at the 11th hour when the matter was argued before me.

[5] There is however a complication in that during the course of the proceedings a third party, one Thamsanqa Mntshali sought to intervene as a necessary party in the proceedings. His application to be joined in the application was not opposed and accordingly he became the 4th Respondent in the matter. I shall come to the circumstances of the joinder and the 4th Respondent's interest in the subject matter presently.

[6] The National Commissioner of Police and the Attorney General, as the nominal representative in the part of the said Commissioner and Government, have also been cited as the 2nd & 3rd Respondents for enforcement purposes.

I am uncertain as to the necessity for this citation and involvement of the State in a civil matter; I note however, that this practice has now become common.

The Third Party and Joinder.

[7] To appreciate the advent and joinder of the 4th Respondent, a sketch of the background common cause facts is necessary. During the course of their marriage, the 1st & 2nd Respondent acquired various immovable assets and household goods as well as certain immovable property situated on Swazi Nation Land.

[8] Among the movable assets are the two motor vehicles which are the subject of prayer 1 in this application. It is common cause that the vehicle registered in the papers as a Foden make truck is a commercial vehicle used for the haulage or transportation of goods.

[9] It is also common ground that the 2nd Respondent runs a business involving the transportation of goods and the truck has been central in these operations as part of the business plant and machinery. The company is registered as DZP Investments (Pty) Ltd. The truck is registered in the 2nd Respondent's name.

[10] The material facts pertaining to the vehicles are that firstly the truck in question was at the time of the institution of these proceedings

mechanically defective and thus grounded and had been taken and placed at a repairer's workshop known as Turbo Diesel in Matsapha.

[11] Applicants case suffers from a number of inherent flaws. Firstly his claim for restitution in so far as its object is restoration of ownership its akin to a vindicatory action is misplaced for two reasons:

- i) firstly the movables listed in prayer 1 (the motor vehicles) are part. of the parties joint estate the distribution whereof falls under the jurisdiction of the traditional Court that is seized with the marital proceedings. His interest or share is not severable from that of the 1st Respondent; secondly;
- ii) the prayer is framed not as restitutory relief but one of restoration of possession. However it is common cause that at the time of the application the Applicant had neither the vehicles in his possession but that it was the 1st Respondent that was in physical control of the vehicles.

[12] There is a further complication in the matters. It is that 1st Respondent sold the truck to the 4th Respondent. There are a number of questions as pertains this sale. These turn on whether the applicant can claim complete ignorance of this fact and that given that not only did he repair the truck in the 1st Respondent's name and held her out as an owner (doctrine of Notice) to the whole world and whether he was completely oblivious of the sale.

- He firstly brings the 4th Respondent's name into the matter as a person that is allegedly involved in an extra-marital affair with his wife;
- He then discloses in his replying affidavit that he was aware of the 4th Respondents' overtures and offer to purchase the truck in its defective state.

[13] It may well be that he has a grievance against the 1st Respondent's act of disposing of the truck, however I do not think he is without recourse or remedy in the circumstances but most importantly he should have anticipated that there would be serious disputes of fact in connection with his claims over the said truck; especially of the sale thereof to the 4th Respondent.

[14] A further impediment faced by the Applicant is that not only was he aware (on a balance of probabilities) that the said truck had been sold by his wife but at this time his application for restoration of possession suffers from the fact that in light of the sale and delivery of the truck to the 4th Respondent, the latter has undertaken and paid for the cost of vehicle's rehabilitation and accessories and fungibles hence a restoration order against his spouse would be ineffectual and a brutum fulmen. As stated the applicant has other legal accrues or remedial options for any prejudice or loss sustained; either against 1st or 4th Respondent.

Jurisdiction>n

[15] A further issue is that an account of the traditional authorities being seized with the issues of the marital proprietary consequences the matter of the final distribution or determination of the parties' respective rights to the said property lies with the authorities in question. His recourse as in prayer 3 lies with the said authorities. That said I see no reason why in light of the 1st Respondent's concession to the application in so far as the other movables including the vehicle described as Mercedes Benz sedan, the Applicant should not have the grant of prayer 2 of the application.

[16] I therefore make the following order in that regard:

- 1) That pending the finalization of the annulment or dissolution proceedings over the marriage of the spouses, the 1st Respondent is hereby restrained and interdicted from alienating and or disposing of the rest of the movable assets in the marital estate.

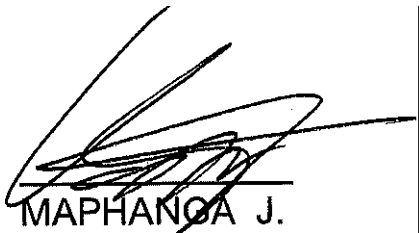
2) The 1st Respondent is further interdicted from disposing of or alienating the motor vehicle listed as Mercedes Benz sedan

Reg: KSD 197 AS

Chassis No:WLDB211652A08581

Engine No: 11294431334418

3) Each party shall bear own costs.



MAPHANGA J.

References:

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|------------------------------------|---|
| For the Applicant | - Mr. C.S. Simelane
C/O Sithole Magagula Attorneys |
| For the 1 st Respondent | - Mr. L.L. Dlamini
C/O Sithole Magagula Attorneys |
| For the 4 th Respondent | - Mr. S.K. Dlamini
Magagula & Hlophe Attorneys |