



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

Held at Mbabane

Case No. 4008/2021

In the matter between:

**ALEX AND SONS INVESTMENTS**

**APPLICANT**

**(PTY) LTD**

**AND**

**METER MIXED CONCRETE**

**1<sup>ST</sup> RESPONDENT**

**DUMSANI DLAMINI**

**2<sup>ND</sup> RESPONDENT**

**FIRST NATIONAL BANK**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation:** *Alex and Sons Investments Pty Ltd vs Meter Mixed Concrete & 2 Others [4008/21] [2022] SZHC 11 (2<sup>nd</sup> February, 2022)*

**Coram:** FAKUDZE, J

**Heard:** 15<sup>th</sup> December, 2021

**Delivered:** 2<sup>nd</sup> February, 2022

## JUDGMENT

### INTRODUCTION

[1] On the 1<sup>st</sup> December, 2021, the Applicant filed an urgent Application seeking an order on an interim basis with respect to the following:

1. *Dispensing with the forms and service and the time limits provided by the Rules of this Honourable Court and hearing the matter as one of urgency;*
2. *Condoning the non-compliance with the Rules of this court;*
3. *That a Rule Nisi do hereby issue returnable on a date to be determined by this Honourable Court calling upon the Respondents to show cause why an Order in the terms set out hereunder should not be made final;*

3.1 *That the Deputy Sheriff in the District of Manzini is hereby authorised to seize and attach the truck described as follows:*

*3.1.1 MODEL: ARGON FREIGHTLINER*

*3.1.2 CHASIS NO: IFUJAWCKIELFT 4255*

*3.1.3 ENGINE NO: 06R1059853*

*3.1.4 REGISTRATION NO: ISD 862 BH*

*presently in the possession of the 1<sup>st</sup> and or 2<sup>nd</sup> Respondent or whatever or with whomsoever it may be found and to*

keep same in the custody of the 3<sup>rd</sup> Respondent or in his  
custody pending the finalisation of this Application;

3.2 That the 3<sup>rd</sup> Respondent or Deputy Sheriff shall handover the  
truck, described above to the Applicant;

3.3 Make an inventory thereof;

3.4 Make a return of service to the Applicant's Attorneys and the  
Registrar of this court of what he has done in execution  
of this Order;

3.5 That the Respondent should pay cost of suit at attorney and  
own client scale, jointly and severally;

3.6 That Prayers 1, 2, 3, 3.1, 3.2 and 3.4 operate as an Interim  
Order with immediate effect;

3.7 Further and or alternative relief.

[2] The Application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. The third Respondent is no longer an interested party since it has been paid the outstanding balance due on the lease by the 2<sup>nd</sup> Respondent.

[3] When the matter came before me on the 15<sup>th</sup> December, 2021, the Applicant filed an Application for the joinder of Mike Mamba and same was not opposed. Mike Mamba was accordingly joined. Mike Mamba did not file any papers.

## **THE PARTIES' CONTENTION**

### **Applicant**

- [4] The Applicant states that he took possession of the truck, which is the subject of this litigation, in or about December, 2019 after paying the 2<sup>nd</sup> Respondent an amount of One Hundred Thousand Emalangenani (E100.000.00). The truck was in the possession of Applicant's Manager, Thami Manda.
- [5] When it came to Eswatini, the Applicant attended to some mechanical faults the truck had on the 28<sup>th</sup> January, 2020. The truck was repossessed by the 3<sup>rd</sup> Respondent and the lease agreement between the two was cancelled by court. On or about June, 2020, the truck was released by the 3<sup>rd</sup> Respondent temporarily to the 2<sup>nd</sup> Respondent and on that same date it was restored to the possession of the Applicant. At all material times the truck was driven by the Applicant's driver Sifiso Gamadze. The reason why the truck was released is because the Applicant had paid to the 3<sup>rd</sup> Respondent an amount of Three Hundred Thousand Emalangenani (E300.000.00).
- [6] Since December, 2019 to date, the Applicant has always been in possession of the truck's blue book, cross border permit, certificate of fitness, amongst other things. On or about July, 2021, the truck was involved in an accident. Since its possession the Applicant has been paying the monthly instalments for the truck and these instalments were inclusive of the insurance policy for the truck. All these were paid to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who in turn paid the 3<sup>rd</sup> Respondent. The truck was registered in the name of the 1<sup>st</sup> Respondent.
- [7] After the accident, the truck was towed away to the Applicant's premises at Phumlamchashi. After various insurers carried out an assessment of the damage, Mbabane Panel Beaters was chosen as the panel beater. It was then

towed away to Mbabane Panel Beaters. While the truck was being repaired, the Applicant defaulted in making monthly instalments and the 3<sup>rd</sup> Respondent issued out a letter of demand. The Applicant settled the arrears on or about 7<sup>th</sup> October, 2021 (See “AL 7”).

[8] The Applicant and the 2<sup>nd</sup> Respondent had an altercation through what's app messages and voice notes regarding arrears. During the altercation between the two, the 2<sup>nd</sup> Respondent sent a message being “annexure AA 2” and further messages demanding to be refunded an amount of One Hundred and Twelve Thousand Emalangenzi (E112,000.00), he allegedly paid to the 3<sup>rd</sup> Respondent for arrears.

[9] The 2<sup>nd</sup> Respondent then without a Court Order or the consent of the Applicant, collected the truck from Mbabane Panel Beaters and disposed of it to a third party, Mike Mamba. The truck was taken for repairs at Mbabane Panel Beaters under the insurance policy paid for by the Applicant, but registered in the name of the Respondent. The Applicant is therefore seeking relief in the form of mandament van spolie.

### **Respondent**

[10] The Respondents argue that the Applicant has failed to disclose some material facts. In paragraph 26 of the founding Affidavit, the Applicant stated that “the 2<sup>nd</sup> Respondent has started using the truck for his benefit without any communication or cancellation of the agreement the Respondent had with the Applicant.” This is materially false and misleading to the court. The Applicant decided not to attach all the messages that were exchanged between the parties. One message which is not attached on the papers shows that the 2<sup>nd</sup> Respondent did communicate to the deponent that he was

cancelling the agreement and taking the truck. The non-disclosure was material to the matter in that spoliation proceedings are granted where the Respondent takes something under stealth. The application must fail for non-disclosure of a material fact.

[11] The other issue the Respondents are raising is that there are disputes of facts surrounding the matter. There is no deed of sale for the truck. The truck was leased to the Applicant. If it was a sale there was no need for the 2<sup>nd</sup> Respondent to fetch the truck where it had overturned, fix it and then pay for the repairs. There is merit in the Respondent's version that the lease was cancelled and therefore the truck should be returned to the Respondent. The other dispute of fact arises from whether the Applicant was in peaceful and undisturbed possession. 2<sup>nd</sup> Respondent alleges that the truck was taken from the Applicant to Mbabane Panel Beaters. The Applicant consented to the taking. Between December, 2019 and 11<sup>th</sup> November, 2021, the truck was never in the possession of the Applicant.

[12] The Respondent also raise the issue of undue delay in bringing the Application to court. The Applicant states that the 2<sup>nd</sup> Respondent took the truck from him with his consent on the 25<sup>th</sup> July, 2021 and fixed it. However, the Applicant does not disclose that the 2<sup>nd</sup> Respondent told him in writing that he was cancelling the agreement and taking the truck on the 7<sup>th</sup> October, 2021. From that date the Deponent knew that the 2<sup>nd</sup> Respondent was going to take the truck from the garage and he did nothing for close to 2 months. The deponent further knew on the 18<sup>th</sup> November, 2021 that the 2<sup>nd</sup> Respondent had taken the truck but did nothing for 2

weeks. Therefore there was undue delay in the Applicant approaching the court. The Application should therefore be dismissed for lack of urgency.

- [13] The last point is that at the time of the filing of the application the Applicant had already lost possession of the truck. The Respondent had taken the truck on the 15<sup>th</sup> July, 2021 by consent. This is the date the Applicant lost undisturbed possession. He was not in peaceful and undisturbed possession since December, 2019 until the 11<sup>th</sup> November, 2021. There was a break in the chain of events. The Applicant lost possession of the truck when it surrendered it to the Second Respondent. The point raised by the Applicant that he bought the truck is of no relevance in spoliation proceedings. Therefore the Applicant's claim based on ownership cannot stand. The Rule issued by the court should therefore be discharged and the Application be dismissed with costs.

### **APPLICABLE LAW**

- [14] In **M. and M. Hiring Magquee CC and Swazi Boy Investment (PTY) LTD t/a Swazi Boy Entertainment High Court Case 2069/19**, it was stated at paragraph [16] that "It is settled law that good faith is a sine qua non in exparte Application. In the case of **Momental SARL V Corlana Enterprise (Pty) Ltd**, the court formulated three cardinal rules of exparte applications as follows:

- [1] In exparte applications all material fact must be disclosed which might influence the court in coming to a decision;
- [2] The non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission (i.e of the order obtained exparte); and

[3] The court, apprised of the true facts has a discretion to set aside the former order or to preserve it.”

[15] In **Mbhekwa Mthethwa V Winile Dube and Others Supreme Court Case 79/12**, the court warned that if there was a dispute of fact in an application one must not use motion proceedings as he run the risk of the Application being dismissed by the court.

[16] On urgency, it was stated in **Frederick Mapanzane V Standard Bank of Swaziland (Pty) Ltd** that

“[11]..... *I do not believe that a litigant is entitled to wait as the Applicant has done before taking up his complaint with the court. A litigant is not expected to wait for ages and then take up his matter with the court on the eleventh hour. This is what the Applicant has done in this case.*”

[17] On the requirement of absence of consent in spoliation proceedings it was stated as follows in **Jan Ntshoeu V Ookame E Smith Case No. CA & R107/2016**.

“[17] *It is common cause that Mr. Smith handed over his vehicle to Mr. Tshoeu during November, 2014 for repairs. The motor vehicle remained with Mr Tshoeu for more than ten months. Mr Smith cannot therefore claim that he was unlawfully deprived of his motor vehicle without his consent or without due legal process. Good title is irrelevant. Mr. Smith claimed a substantive right to possession based on ownership which cannot stand in these proceedings*



*[18] Mr Smith has failed to prove unlawful deprivation of the possession by Mr. Tshoeu. The appeal succeeds.”*

## **COURT’S ANALYSIS AND CONCLUSION**

- [18] For an Applicant to succeed in an Application for spoliation, he must show that (a) he was in peaceful and undisturbed possession of the things; (b) he was unlawfully deprived of such possession..... [See **Busisiwe Makhanya V Absalom Makhanya, Civil Case No. 1430/2004**]. It has also been established that for purposes of showing that the Applicant was in peaceful and undisturbed possession of the things, it is not necessary for the Applicant to exercise comprehensive continuous or personal control. Once physical control has been established temporal interruptions will not necessarily imply that control has been lost.
- [19] The question that begs is have both requirements for spoliation been satisfied? The answer is simple. The Applicant has proven that he was in control of the truck but has failed to prove that same was taken from him unlawfully. He consented to the truck being taken to Mbabane Panel Beaters. On this point alone the application for spoliation fails.
- [20] In addition to what has been said in paragraph 19 (that is the applicant failing to make a case for spoliation) the court is also convinced that there was an inordinate delay in filing the application. The urgency thereof amounts to an abuse of the court process. The court is further convinced that the Applicant did not disclose a material fact that the Respondent did inform the Applicant that he is terminating the lease. This was by the short message of 7<sup>th</sup> October 2021. There was also a dispute of fact as to whether there was

an agreement of sale or an agreement of lease between the parties. The Applicant contends that the parties entered into an agreement of sale and the Respondent alleges that it was an agreement of lease.

[21] In totality of all that has been said above, the Rule that was issued by this court on the 1<sup>st</sup> December, 2021 is hereby discharged with costs.

A handwritten signature in black ink, appearing to be 'FAKUDZE J.', written over a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT

Applicant: K. N. Simelane

1<sup>st</sup> and 2<sup>nd</sup> Respondent: N.D. Jele