



## JUDGMENT

### INTRODUCTION

[1] On the 8<sup>th</sup> March, 2023, the Applicant filed an Application under a Certificate of Urgency seeking the following:

1. That the Rules of this Honourable Court relating to form, time limits, and manner of service be dispensed with and that this matter be heard as one of urgency;
2. Directing the 1<sup>st</sup> Respondent or any other person acting at his behest to forthwith restore to Applicant's possession items unlawfully seized by the 1<sup>st</sup> Respondent on the 3<sup>rd</sup> March, 2023 from Applicant's place of business situate at Matsapha, District of Manzini, which items are listed in "Annexure E" annexed to the Founding Affidavit of Applicant;
3. Releasing from any judicial attachment, the items listed under "Annexure E;"
4. Directing that the costs of restoring possession of the attached items be borne by the 1<sup>st</sup> Respondent;
5. That pending finalisation of the matters, prayers 1, 2, 3 and 4 operate with immediate and interim effect;
6. Granting to the Applicant costs of Application at a punitive scale; and
7. Further and/or alternative relief.

[2] The 2<sup>nd</sup> Respondent filed the Notice of Intention To Oppose.

## **The parties' contention**

### **The Applicant**

- [3] Initially, the 2<sup>nd</sup> Respondent had raised a point of law regarding the non-joinder of Madu Carz (Pty) Ltd t/a Eswatini Electra. During argument, this point was abandoned by the 2<sup>nd</sup> Respondent. It therefore remains abandoned.
- [4] The Applicant's case is that it is not Madu Carz (Pty) Ltd t/a Eswatini Electra. It contends that the premises where the attachment took place, Lot 784, Matsapha Industrial Site belongs to it as proven by the Lease Agreement attached and marked as "Annexure B" and the Trading Licence that was issued in its favour and marked as Annexure "A."
- [5] The Applicant further contends that the summons initiating the legal process were served on its premises and same were transmitted to the owner of Madu Carz. The Applicant and Madu Carz have a special working relationship between them. This relates to the fitting of tyres belonging to Madu Carz.
- [6] The Applicant contends that it was in peaceful and undisturbed possession of its goods when same were attached by the 1<sup>st</sup> Respondent. The taking of its goods/assets was unlawful in that they were taken away in the mistaken belief that they belong to Madu Carz.
- [7] The Applicant argues that it is in the business of fitting tyres. So when Madu Carz bought the tyres from the 2<sup>nd</sup> Respondent, it instructed the 2<sup>nd</sup> Respondent to deliver the tyres at Applicant's place for purposes of fitting them and not that it is Madu Carz business premises.

[8] The Applicant prays that since the 1<sup>st</sup> Respondent attached properties belonging to the Applicant, it was unlawfully dispossessed of its properties and same should be restored to it.

**The 2<sup>nd</sup> Respondent**

[9] The 2<sup>nd</sup> Respondent avers that the Applicant has failed to prove that the property was taken from it unlawfully. Further there is nothing in the Applicant's papers to suggest that the Applicant was in control or owned the goods under attachment. Since there are no source documents for the goods in the name of the Applicant, the Applicant's case falls far below the legal requirement for spoliation.

[10] The 2<sup>nd</sup> Respondent further avers that the Applicant's case is riddled with inconsistencies in the following material respects:

(a) At paragraph 7, the Applicant's Director states that the goods were attached at its premises in Moneni, Manzini. This is in contradiction with the evidence of the Deputy Sheriff that the goods were attached in Matsapha as per the Defendant's description in the Writ of Attachment; and

(b) The Applicant relies on the Trading Licence in "Annexure A1." This trading licence does not assist the Applicant's case in that it expired in December 2022. The licence is for premises situate in Moneni and not Matsapha where the goods were attached.

[11] The 2<sup>nd</sup> Respondent argues that the Applicant relies on a Lease Agreement "Annexure B." Ironically the lease was issued in favour of CTX TYRES BATTERIES which is a distant company from Applicant. The 2<sup>nd</sup>

Respondent further states that the relationship between the Applicant and Madu Carz has not been explained. At one stage in 2021, the Applicant and Madu Carz occupied the same premises in Moneni Manzini. The acceptance of the summons at Matsapha by Mangaliso and his subsequent acquiescence to the attachment of the goods by the Deputy Sheriff is consistent with the allegation by the Applicant that the goods belong to Madu Carz.

### **The Law**

[12] In **Jabulani Mbuyisa v Swaziland Electricity Company (904/2015) SZHC**, the court stated as follows:

*“In order to succeed in mandament van spolie and Applicant must show that he was in peaceful and undisturbed possession of the property sought to be returned and that he was unlawfully deprived of such possession. There can be no spoliation if the removal of the property was lawful.”*

*(See also Dlamini Malungisa vs Msibi Timothy 1987 – 1995 SLR 121 at 122)*

[13] Likewise in **Kramar v Trustees Christian Coloured Vigilance Council Grassy Park 1948 (1) SA 748** at 752, Herbstein J. observed that for a party to succeed in a spoliation application, it must prove that:

- (a) “the Applicant was in peaceful and disturbed possession of the property; and
- (b) the Respondent deprived him of the possession forcibly and wrongfully against his consent.”

## **Court's Analysis and Conclusion**

[14] Having gone through the papers filed of record and having heard Counsel for the Applicant and the 2<sup>nd</sup> Respondent, the court comes to the conclusion that the goods attached by the 1<sup>st</sup> Respondent belong to the Applicant. The Applicant has established that it is not Madu Carz (Pty) Ltd t/a as Eswatini Electra. It is Madu Carz that owes the 2<sup>nd</sup> Respondent the money that led to the attachment. The Applicant has established that the registered office of the Madu Carz is at Mona Flats, Mbabane and the premises where the tyres were delivered by the 2<sup>nd</sup> Respondent belong to the Applicant. This is by virtue of the lease agreement that was attached by the Applicant in its founding papers. The Applicant has further come up with a reasonable explanation as to how the summons were delivered at the Applicant's place and same were transmitted to Madu Carz. The Applicant receives same on behalf of Madu Carz. The Applicant has explained by way of a Replying Affidavit how he informed the 1<sup>st</sup> Respondent that the attached goods belong to it. This fell on deaf ears on the part of the 1<sup>st</sup> Respondent. 2<sup>nd</sup> Respondent's Attorney, by way of a supporting Affidavit, explained that Mr. Maseko, attorney for Eswatini Electra and later for the Applicant, never informed the attorney for the 2<sup>nd</sup> Respondent that the 1<sup>st</sup> Respondent was informed as to the ownership of the goods. However, the Applicant's attorney clarified that in the Replying Affidavit. This was not challenged by the 2<sup>nd</sup> Respondent and it therefore remained uncontested.

[15] The 2<sup>nd</sup> Respondent has raised the issue that the Applicant's name is different from the one that appears in the Trading Licence. The Trading Licence makes reference to CTX TYRES AND BATTERIES. However, the licence shows that it belongs to "CTX QUALITY LUBRICANTS

(Propriety) Limited trading as “CTX QUALITY TYRES AND BATTERIES.” The court’s observation is that the Applicant has been correctly cited.

[16] In conclusion the court states that the Deputy Sheriff, the 1<sup>st</sup> Respondent attached the goods belonging to the Applicant in the mistaken belief that they belong to Madu Carz and therefore the Applicant is entitled to same being restored back to it. The Application is therefore upheld with costs at an ordinary scale.

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**FAKUDZE J.**

**JUDGE OF THE HIGH COURT**

Applicant: A. Hlatshwako

Mr. S. Maseko

2<sup>nd</sup> Respondent: Mr. Manyatsi