IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 320/2021

In the matter between:

SHER FALIK Applicant

And

SILENCE GAMEDZE N.O 1st Respondent

NOKUPHIWA GAMEDZE 2nd Respondent

THE NATIONAL COMMISSIONER OF POLICE 3rd Respondent

THE ATTORNEY GENERAL 4th Respondent

In re:

NOKUPHIWA GAMEDZE Applicant

And

SIPHE-AMAHLE INVESTMENTS (PTY) LTD Respondent

Neutral Citation: Sher Falik vs. Silence Gamedze & 3 Others in re: Nokuphiwa Gamedze vs. Siphe-Amahle Investments (Pty) Ltd (320/2021) [2022] SZIC102 (24 August 2022)

Coram: **V.Z. Dlamini – Acting Judge**
(Sitting with Mr. D.P.M. Mmango and Mr. M.T. E Mtetwa – Nominated Members of the Court)

Last Heard: 21 July 2022

Delivered: 24 August 2022

Summary: *Applicant, not being the Judgment Debtor instituted an urgent application seeking the release of a motor vehicle attached from him by the 1st Respondent, Deputy Sheriff in execution of an order of the Court granted in favour of the 2nd Respondent. Applicant's ownership rights over motor vehicle disputed by Respondents.*

Held: *It is an established legal principle that execution of an Order of Court may only be levied against the assets of the Judgment Debtor. On the papers filed before Court, the Applicant has failed to prove ownership of the motor vehicle in question.*

JUDGMENT

INTRODUCTION

[1] The Applicant in the interlocutory application is a businessman of Pakistani origin residing at Magevini area, Matsapha in the Manzini district of Eswatini; he joined issue as a claimant of a movable asset that was attached by the 1st Respondent, a Deputy Sheriff for the district of Manzini. The 2nd Respondent

is the Judgment Creditor and Applicant in the main matter in respect of which a Writ of Execution was issued out of the office of the Registrar following an order granted by this Court on the 1st December 2021 against the Judgment Debtor and Respondent in the main matter who has not been joined in the present application.

[2] The Applicant seeks the following orders:

1. *Dispensing with the Rules of Court as relate to forms, service and time limits and enrolling this matter on an urgent basis;*

2. *Condoning Applicant's non-compliance with the Rules of this Honourable Court;*

3. *Directing and ordering the 1st Respondent to deliver to the Applicant's attorney or to the Applicant the motor vehicle in paragraph 4 herein under, pending finalization of these proceedings; failing which,*

4. *Authorising and empowering the Sheriff or her lawful deputy Sheriff in the Manzini district to seize and attach from the 1st Respondent or whosoever is in possession of the herein under mentioned motor vehicle, to wit:*

MAKE	:	*MAZDA DEMIO*
MODEL	:	*2009*
ENGINE NUMBER	:	*ZJ747749*
CHASIS NUMBER	:	*DE3FS196474*
REGISTRATION NUMBER	:	*VSD 523CH*

5. *Directing and ordering the members of the 3rd Respondent to assist the deputy Sheriff in the execution of the Orders issued herein particularly in making sure that there is compliance from the 1st Respondent and whomsoever is in possession of the motor vehicle.*

6. *Awarding costs of this application against the 1st and 2nd Respondents in the event of opposition; and*

7. *Granting Applicant such further and/or alternative relief as the Court may deem fit.*

BACKGROUND FACTS

[3] On the 1st December 2021, the Court granted an order in favour of the 2nd Respondent/Judgment Creditor in terms of which a default judgment dated the 14th September 2021 issued by the Conciliation Mediation and Arbitration Commission (CMAC) was registered. CMAC directed the Judgment Debtor to pay the Judgment Creditor an amount of **E 40, 275.00**. It appears that the order of this Court, which is marked annexure ***"A4"***, was served on the Judgment Debtor's Attorney Mr. Vukile Ndzimandze on the same day it was granted. A Writ of Execution was then issued by the Registrar on the 24th December 2021.

[4] On the 8th July 2022, the 1st Respondent while in the company of the 2nd Respondent presented the Writ to the Applicant for execution at his house in Matsapha; the basis for presenting the Writ to the Applicant was that the 1st and 2nd Respondents had reason to believe that an asset belonging to the Judgment Debtor was in his possession. The 1st Respondent then attached and

removed the asset a motor vehicle which is a subject of this litigation, from the Applicant's possession. Following the attachment, the Applicant moved the present application on the 11th July 2022.

APPLICANT'S CASE

[5] The Applicant's ground for instituting the application is that he owns the motor vehicle that was attached having purchased it from the Judgment Debtor on the 16th December 2021; and annexed to application is a copy of an invoice allegedly issued by the Judgment Debtor to him upon payment of the purchase price; it is marked ***"A9"***. The Applicant further annexed a copy of the motor vehicle's registration certificate, which is marked ***"A11"***. Whereas the registration certificate reflects the Judgment Debtor's name as the registered owner and title holder, the Applicant explained that he had not effected a change of ownership due to his busy work schedule.

[6] A confirmatory affidavit deposed to by a certain Mr. Shazal Afzal who claims to be a remaining Director of the Judgment Debtor forms part of the Applicant's papers. He confirms that the Applicant bought the motor vehicle in question and upon the sale of the motor vehicle, he furnished the Applicant with all the necessary documents to effect a change of ownership. He expressed dismay that the Applicant had not effected the change of ownership to-date, but attributed this to his busy work schedule. Mr. Afzal further confirmed that upon the sale of the motor vehicle, he prepared a letter authorizing the Applicant to use it to travel to the Republic of Mozambique as the change of ownership was not done immediately upon the conclusion of the transaction.

to test the veracity of exhibit ***"A9"***. Regarding the confirmatory affidavit, the 2nd Respondent disputed its contents and alleged that Mr. Afzal was not in the country in the month of December 2021 and nothing turned on Mr. Afzal's affidavit because he and the Applicant had an employer/employee relationship; he was simply colluding with the Applicant to avoid liability.

ANALYSIS

[13] During the course of argument, the 2nd Respondent's representative abandoned the point in *limine* on the Applicant's requirement to furnish security for costs. On Urgent Applications, **Rule 15 (2)** and **(3)** of the Court's Rules reads as follows:

> *"The affidavit in support of the application shall set forth explicitly-*
>
> *(a) the circumstances and reasons which render the matter urgent;*
> *(b) the reasons why the provisions of Part VIII of the Act should be waived; and*
> *(c) the reasons why the applicant cannot be afforded substantial relief at a hearing in due course.*
>
> *On good cause shown, the court may direct that a matter be heard as one of urgency."*

[14] In the case of **Bongani Bhembe v Brooklyn Investments (391/2016) [2017] SZIC 03 (06 February 2017) at paragraph 11**, the Court applied **Rule 15 (2)** and **(3)** as follows:

"The rules of this Court make it peremptory that litigants wanting to be heard on an urgent basis shall expressly state, a) circumstances and reasons which render the matter urgent, b) the reasons why the provisions of Part VIII of the [Industrial Relations Act, 2000 as Amended] should be waived and c) the reasons why that litigant cannot be afforded substantial relief at a hearing in due course. All this has to be stated in detail. Nothing should be left implied. And once the Court is satisfied that good cause has been shown for the matter to be heard on an urgent basis, it may direct that it be heard as such".

[15] The 2nd Respondent's point on urgency is premised on the time it took the Applicant to launch the application following the attachment of the motor vehicle. The Respondent did not dispute the fact that the Applicant uses the motor vehicle for business on a daily basis. The Court would be applying **Rule 15** too mechanically if it were to refuse to enroll the matter as urgent purely on the basis that the Applicant failed to lodge the application on Saturday or Sunday, the **9th** and **10th** July 2022 respectively. In any event, the application, which was launched by an alleged owner (not the Judgment Debtor) of an attached vehicle, was based on the common law remedy of *rei vindicatio*; hence the provisions of **Part VIII** of the **Industrial Relations Act 2000 (as amended)** do not apply.

[16] It is common cause that the relief sought is based on *rei vindicatio*; consequently, contention point that the requirements of an interdict were not met has no substance. The requirements of an interdict were expounded in

the case of **Thokozile Dlamini v Chief Mkhumbi Dlamini and Another (2/2010) [2010] SZSC 3 at page 8,** as follows:

> *"Now following the celebrated case of Setlogelo v Setlogelo- it is well established that the pre-requisites for an interdict are clear right, injury actually committed or reasonably apprehended and the absence of similar protection by another remedy..."*

[17] On the other hand, the requirements of *rei vindicatio* were enunciated in the case of **William Andrew Bonham v Master Hardware (Pty) Ltd t/a BUILD IT (294/2008) [2009] SZHC 131 (14 April 2009)**, as follows:

> *"Regarding the question of whether the Applicant has satisfied the elements of the rei vindicatio, it was the 1st Respondent's contention that the Applicant had dismally failed on that score. The 1st Respondent, placed heavy reliance on Silberberg and Schoeman's The Law of Property, by Kleyn & Boraine, 3rd Ed, Juta & Co. at page 274, where, 8 the learned authors state that in order for a party to succeed in the rei vindicatio, he or she must satisfy two requirements, namely (i) that the said party is the owner of the property sought to be vindicated; and (ii) that it was in the possession of the defendant at the commencement of the action."*

[18] In the Court's view, a point of substance pertains to the dispute of ownership of the motor vehicle in question. This point subsumes the question of joinder and dirty hands. In the case of **Elite Motors v Mhleli Fakudze & Another**

in re: Mhleli Fakudze v Live Motors Case No.437/2007 SZIC at **paragraphs 3,** and **6**, the Court said the following:

> *"It requires no argument that in law execution may only be levied on the asset of a judgment debtor. Since the judgment debtor is Live Motors (Pty) Ltd, it follows that execution may not be levied on the Applicant's assets.....Where there are conflicting claims with respect to property which a Deputy Sheriff seeks to attach in execution, he may attach the property and issue an interpleader notice in terms of the procedure provided in Rule 58 of the High Court Rules of Court."*

[19] The Court continued to say the following at **paragraph 7** of the **Elite Motors (supra)** decision:

> *"The Applicant is entitled to be protected against attachment of property which is its bona fide lawful property. This does not preclude the Deputy Sheriff, if he is satisfied on reasonable grounds that property in the possession of a third party belongs to the judgment debtor, from attaching the property and referring any conflicting claims to court for adjudication by way of the interpleader procedure."*
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> [Emphasis added].

[20] Evidently, the 1st Respondent did not issue an interpleader notice; but the Applicant never took issue with that omission. In our view, the omission will not prevent the Court from determining the point in *limine* under review. The approach a Court should adopt in resolving disputes of fact that arise in motion

proceedings was laid down in the case of **Nokuthula N. Dlamini v Goodwill Tsela (11/2012) [2012] SZSZ 28 (31 May 2012)** at **paragraph 31**:

> *"In the South African Cases of **Frank v Ohlossons Cape Breweries Ltd 1924 AD 289, Botha v Englelbrech 1910 TPD 853, Ex parte Potgieter (1905) 225C** and **Arnold v Viljoen 1954 (3) SA 322 (C) at 329 Pr - A,** it has been restated that an application can properly be decided on affidavits in the absence of a real or genuine dispute of fact. The correct judicial approach is well laid out by the Court in **Plascon - Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 634L-635B** as follows:-*
>
> > *"[W] here in proceedings on notice of motion disputes of fact have arisen on the affidavit, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact ... If in such a case the respondent has not availed himself of his right for the deponents concerned to be called for cross-examination under **Rule 6 (5) (g) of the Uniform Rules of Court**... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include the fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks..."*

[21] The Applicant relies on the copies of the invoice (***"A9"***), the letter authorizing him to use the vehicle (***"A10"***) and the confirmatory affidavit deposed to by one of the Judgment Debtor's directors to prove that ownership of the motor vehicle was transferred from the Judgment Debtor to him.

[22] While the motor vehicle registration certificate (***"A11"***) itself is *prima facie* and not conclusive proof of ownership, the Applicant still bears the onus of proving that ownership transferred from the Judgment Debtor to him.

See: **Afinta Motor Corporation v Frank Carlos Nerves Civil Case No. 1569/99 (*unreported*)**; **Bheki Shongwe v Contour Bedding Swaziland Limited (119/15) [2016] SZHC 71 (12 April 2016)**; **First National Bank of SA Ltd v Quality Tyres 1970 (Pty) Ltd (434/1993) [1995] ZASCA 65.**

[23 In a portion translated from Afrikaans to English in the case of **Trust Bank Van Afrika Bpk v Western Bank Bpk en Andere NNO 1978 (4) SA 281 (A) op 301h – 302 a,** the Court said the following at **paragraph 27**:

> *"According to our law, ownership of movable property passes to another where its owner delivers it to another, with the intention of transferring ownership to him, and the other takes the property with the intention to acquire ownership thereof. The validity of the property transfer is separate from the validity of the underlying contract."* [Our emphasis].

[24] Another translation on the same principle appears in the case of **Air-hel (EDMS) Bpk H/A Merkel Motors v Bodenstein en 'N Ander 1980 (3) SA 917 (A)** at **paragraph 28**:

"Mere agreement therefore cannot transfer property rights – tradition (handover) must also take place, and conversely, mere handover is not sufficient either- it must be accompanied by an agreement between the handover and the recipient that property rights are given and taken with it..."

[25] At this stage of the inquiry, the Court has to determine whether the facts as averred prove that there was an intention to transfer ownership and the intention to receive ownership between the Judgment Debtor and the Applicant respectively. First and foremost, it is quite odd that eight (8) months after the transfer of ownership of a motor vehicle, a new owner of a vehicle would still require the authority of the previous owners to drive it across the borders of this country. Excepting the principle about the blue book being *prima facie* proof of ownership; that the Applicant, a motor vehicle dealer in his own right and a person of means could not effect a change of registered title over eight (8) months because he was busy, is unbelievable.

[26] The 2nd Respondent's assertion that Mr. Afzal was not in the country in December 2021 was uncontroverted by the director himself. The 2nd Respondent's version is given weight by the fact that the invoice was not issued by Mr. Afzal. The person who issued the invoice did not depose to an affidavit confirming that an amount of **E 45, 000** was received by the Judgment Debtor from the Applicant. No explanation was offered for this omission. The confirmatory affidavit from the person who allegedly received the money on behalf of the Judgment Debtor was essential in light of the fact that no deed of sale was annexed in the founding affidavit nor were the

particulars of the sale averred as per the requirements of **Rule 18** of the **High Court** read with **Rule 28 of** this Court.

[27] **Rule 18** of the High Court reads as follows:

> *"A party who in his pleading relies on a contract shall state whether the contract is written or oral and when and where and by whom it was concluded, and if the contract is written a true copy thereof or the part relied on in the pleading shall be annexed to the pleading."*

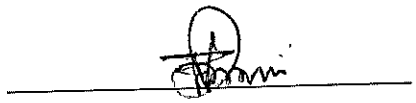
[28] Although **Rule 18** ordinarily applies in action proceedings, the principle equally applies in motion proceedings more so because the affidavit deposed to by the applicant constitutes and contains not only his allegations, but his evidence. See: **Simon Vilane N.O. and Others v Lipney Investments (Pty) Ltd (23/2013) [2014] SZSC 28 (30 May 2014.**

[29] Save for producing the invoice that is dated the 16th December 2021, both the Applicant and Judgment Debtor's director did not state whether the contract was written or oral, where it was concluded and who represented the Judgment Debtor. Moreover, a true copy of the invoice was not annexed in the founding affidavit nor the original exhibited in Court. The above findings of the Court must be juxtaposed with the fact that the Applicant's knowledge of the Judgment Debtor's affairs went beyond the ordinary.

[30] At **paragraph 23** of the founding affidavit, the Applicant says the following:

[b] The Applicant is ordered to pay the 2nd Respondent's costs of opposing the application.

The Members agree.



V.Z. DLAMINI

ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant : Mr. D. Hleta
(DEMHLETA LEGAL)

For 1st & 2nd Respondents : Mr. V. Magagula
(Labour Law Consultancy)

"I humbly submit that I bought the motor vehicle described above on the 16th December 2021 when the Respondent encountered serious problems with the Eswatini Revenue Authority which eventually led to its closure around the month of February 2022 and Respondent's business premises locked by the Eswatini Revenue Authority"

[Emphasis added].

[31] The Applicant does not say what or who the source of the information stated at **paragraph 23** of the founding affidavit was, nor does the Judgment Debtor's director state that he informed the former about same. It is unlikely that a random customer of the Judgment Debtor would know of its tax affairs with the Eswatini Revenue Authority to the point of knowing even the date of closure of its business operations, which allegedly occurred two months after purchasing the vehicle in question. The Applicant's knowledge of the business affairs of the Judgment Debtor makes the 2nd Respondent's version that he also worked for Siphe - Amahle Investments plausible.

CONCLUSION

[32] Based on the above reasons, the Court holds that on the papers before it the Applicant has failed to prove that he is the true owner of the motor vehicle in question so as to succeed on the remedy of *rei vindicatio*.

[33] In the result, the Court orders as follows:

[a] The Application is dismissed.