

(Held at Mbabane)

In the matter between:

Isaac S. Shabangu Appellant

and

Commissioner of Police First Respondent

Attorney General Second Respondent

Cargo Motor Corporation Limited Third Respondent

A Shabangu for the Appellant

PE Flynn for the Third Respondent

Coram: Schreiner,

Leon and

Browde JJA

JUDGMENT

Schreiner JA: The Appellant whom I shall call "Shabangu" launched an urgent application on the 2nd February 1995 asking that a rule nisi should issue calling upon the First Respondent, the Commissioner of Police, to show cause why a final order should not be granted directing him to return to the Applicant a certain motor vehicle described as "Honda Ballade, Registration Number S1 1801S, Engine Number B18B32000321 and Chassis Number HHMDE 25413E124352 [which I shall call "the vehicle"] at present in the possession of the Royal Swaziland Police at the

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Mbabane Police Headquarters". The Notice of Motion also asked that the above final order should operate as an interim order with immediate effect pending the return date of the rule nisi. In addition there was a prayer for costs in the event of the application being opposed. Shabangu filed a founding affidavit the details of which will be dealt with later in this judgment.

On the 15th March 1995 a company called Cargo Motors Corporation Limited ("Cargo Motors") filed a Notice of Motion in which it asked for leave to be joined as the Third Respondent in the proceedings commenced by Shabangu. The Attorney General as First Applicant and the Commissioner of Police as Second Applicant then filed an Interpleader Notice in terms of Rule 58 of the High Court Rules in which they stated that they were willing to deal with or act in regard to the subject matter of the dispute as the Court should direct. The record does not contain any order of court granting leave to Cargo Motors to intervene in the proceedings but from the judgment of the Chief Justice it is clear that such leave was given and the dispute was then dealt with on the basis that it was between Shabangu and Cargo Motors, and that the Commissioner of Police and the Attorney General would merely comply with any order that the Court might make. In its application to intervene Cargo Motors attached an affidavit by a Mr Reynders. The Notice of

motion asks that this affidavit should be treated as the answering affidavit of Cargo Motors in the proceedings by Shabangu in which it seeks to intervene.

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Shabangu's founding affidavit relates how he met one Xavier Mthetwa on about the 15th February 1994. He knew him through a mutual interest in football. Mthetwa was asked to obtain in South Africa a vehicle which was smaller than the one which Shabangu had and he later brought the vehicle which he offered to sell for E65 000. Shabangu agreed to buy it and, on the 31st March 1994, he completed an Application and Notice in Respect of Registration and Licensing of Motor Vehicle form.

Shabangu attaches to his affidavit copies of various documents which seem to have required completion in order to transfer a South African owned vehicle to a Swazi resident. The question of the admissibility of these documents without verification by affidavit of the person who completed them was not argued before us. I do not think that the matter need have been raised in view of the rebuttable presumption that ownership vests in the person having possession of a vehicle when it is seized by the police.

Nothing happened as far as Shabangu was concerned until the 22nd February 1995 when the vehicle was taken by the Royal Swaziland Police from the possession of his wife and detained by them. It is alleged that it is standing in the open and deteriorating rapidly.

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The reason for taking the vehicle into the possession of the Police was a claim by Cargo Motors that it was the owner. Reynders, the Sales Manager of the Germiston Branch, disposes to what happened in regard to it. He says that Cargo Motors, acting as a dealer, bought a motor car from a company called Mercurius Motors (Pty) Limited and paid for it by a cheque for R85 963,98 dated 29th March 1994. The tax invoice shows Engine and Chassis number which agree with the documents produced by Shabangu and it would appear that this is the vehicle which was delivered at in Mbabane to him.

Still during March 1994 Reynders says that Cargo Motors received an enquiry from a certain GS Phakula of Gabarone, Botswana in regard to the availability of a new Honda Ballade 180 and an oral agreement was concluded for a cash sale of the vehicle for the sum of "E91 4280,50 (ninety one thousand, four hundred and twenty five Rands and fifty cents)". It was agreed that Phakula would deposit the money to: the credit of the Cargo Motors' bank account. (The statement of the price in Emalangenani in the affidavit of Reynders may be incorrect and it is likely that it was quoted in Rands or Pula)

On the 30th March 1994, Reynders says in paragraph 9 of his affidavit, Cargo Motors received a statement from First National Bank, Johannesburg reflecting that a cheque for R91 425,60 had been credited to the corporate account of the company.

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On the 31st March Phakula was invoiced for the motor vehicle and telephonic instructions from Phakula were received on the 4th April to deliver the vehicle to one Raymond Louis Lande. An identity document of Lande was produced by him and the vehicle duly delivered in terms of the instruction. (Paragraph 10)

On the 14th April, Reynders continues, Cargo Motors' bank statement showed a debit of R91 425,60 and it was told that the cheque which had been given to First National Bank had been

returned marked "refer to drawer"(paragraph 11,) It appears from what Cargo Motors were told that the cheque was drawn against the account of the Ngweleza Health Ward Committee and had been signed by one "Peter Hasleu". The cheque form was taken from a cheque book reported to have been stolen in 1993 and was not co-signed as required by the constitution of the Committee (paragraph 12).

Shabangu's counsel attacked the admissibility of the evidence relating to the contention that ownership in the vehicle had not passed from Cargo Motors as a result of the transaction deposed to by Reynders. Basic to the argument was the absence of any admissible evidence as to what happened in regard to payment for the vehicle because it is clear that Shabangu is not in a position to deny that the original agreement was for a cash sale.

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Interpleader proceedings often give rise to difficulties as to who should be plaintiff and who defendant and the closely related matter of the onus of proof. Sometimes the court is not in a position to make any ruling in regard to the first issue when proceedings are commenced. (See eg. Greenfield N.O. v Blignaut and Others 1953 (3) SA 597 (SR)). On the other hand, it has sometimes been possible to do this by virtue of the rebuttable presumption that a person in possession of movables at the time of its seizure by the person who issues the interpleader notice is to be regarded as the prime facie owner. He should therefore be regarded as the defendant or respondent in the proceedings and the onus of proof should rest upon the claimant who was not in possession before the seizure. This person should be regarded as plaintiff or applicant (Bruce N.O.V. Josiah Parkes and Sons Limited and others 1972 (1) SA 68 (R); see too Ebrahim and Deputy Sheriff. Durban and Another 1961 (4) SA 265 (D) and Zandberg v Van Zyl 1910 AD 258 at 272).

In the present case Shabangu, through his wife, was in possession of the vehicle when it was seized by the police and consequently the burden of proof rests on Cargo Motors to establish on a balance of probabilities that the vehicle belonged to it by rebutting the presumption of ownership in Shabangu arising from possession before seizure.

Paragraphs 9,11 and 12 of the affidavit of Reynders contain allegations which are made as a result of statements contained in documents sent by the Bank to Cargo Motors and other information supplied to it concerning the cheque which was dishonoured. The statements in regard to these matters are hearsay and

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so inadmissible. No representative of the Bank filed an affidavit which verified the bank statements and their accuracy or the details of the cheque which was given for presentation to the paying banker. It would serve no purpose to speculate as to which official or officials of the Bank would have had the required knowledge of the facts to be able to give admissible evidence concerning of the bank statements and the details regarding the cheque. No admissible evidence at all was adduced in. this regard so that all the statements concerning what occurred at the Bank must be disregarded. It seems to me therefore that the Court is not in a position to say whether or not payment was made to the Bank in respect of the purchase price of the vehicle at the time it was acquired in terms of the agreement between Shabagu and Mthetwa.

This is not a case where the contents of the paragraphs 9, 11 and 12 of the affidavit of Reynders constitute secondary and not the best evidence which the Court may, if the circumstances permit, receive (see Gemeenskaps ontwikkelingsraad v Williams and Others 1977 (2) SA 692(W)). There is no evidence at all. There is not even a direct assertion by Reynders that Cargo Motors has not been paid. All he says in effect is that the Bank told Cargo Motors that the cheque had been

dishonoured.

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It does not appear that Shabangu gave any notice of an application to strike out the offending passages of paragraphs 9, 11 and 12. It has been held that a Court will not entertain an objection to evidence or affidavits unless notice of intention to strike it out has been given (*Ehler (Pty) Limited and Silver 1947 (4) SA 173(W)*; *Abromowitz v Jacquet and Another 1950 (2) SA 247(W)* at 251). The failure to give notice of intention to argue the admissibility of evidence cannot, in my view, render hearsay evidence, which is not evidence at all, admissible. The Court cannot infer from the mere failure to object that the other party accepts the correctness of the hearsay allegations. This is so especially where, as here, the other party formally denies the allegations in the disputed paragraphs.

I conclude therefore that Cargo Motors has not produced admissible evidence to show on a balance of probabilities that it was the owner of the vehicle and that the presumption in favour of the Shabangu has not been rebutted. It is not necessary to deal with the contention on behalf of Shabangu that something happened subsequent to the conclusion of the contract which meant that Cargo Motors' intention to pass ownership came into existence before the Shabangu purchase.

I make the following order:-

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1. The appeal is upheld and the order of Hull CJ set aside.
2. The Royal Swaziland Police are directed to deliver Honda. Ballade Registration Number SD1801S Engine Number B18B32000321 Chassis Numbers HHMDE 2513E124352 to the Appellant.
- 3 The Respondent is ordered to pay the costs of the interpleader proceedings in the High Court and of the Appeal.

SCHREINER J.A.

Leon JA:

I agree.

Browde JA:

I agree.

Judgment handed down on.....1995

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