IN THE APPEAL COURT OF SWAZILAND

HELD AT MBABANE

CIV. APPEAL CASE NO.

In the matter between:

THOMAS MSONGELWA MABELESA Appellant

and

DORBYL VEHICLE TRADING AND FINANCE
COMPANY (PTY) LTD Respondent

CORAM:

Kotze' P.

Steyn J.A.

Tebbutt J.A.

Judgment (14/96)

TEBBUTT J.A.

On 16 April 1993 appellant and respondent entered into a written instalment sale agreement in respect of a 1993 model Mercedes Benz 07 1317 passenger bus. Terms of the agreement was that ownership would not pass to appellant until the full purchase price had been paid and that if appellant defaulted in the punctual payment of any instalment respondent would be entitled to cancel the agreement, take possession of the bus, retain all payments already made by appellant and claim payment of all amounts still due to be paid. I shall refer to this as the Instalment Sale Agreement.

On 27 December 1993 appellant and respondent entered into a rental agreement in which respondent rented to appellant a 1993 model Mercedes Benz OF 1624 passenger bus. Terms of that agreement were also that the bus remained the property of respondent and that in the event of appellant's defaulting in the punctual payment of any rental, respondent would be entitled to cancel the agreement, retake possession of the bus, retain all amounts paid and claim any arrear amounts payable at the date of cancellation. I shall refer to this as the Rental Agreement.

It is undisputed that appellant fell considerably in arrears with his instalment and rental payments in both agreements and respondent thereupon cancelled the agreements.

On 21 July 1995 respondent applied for and was granted a rule nisi calling on appellant to show cause why the agreements should not be declared to be cancelled, and directing the appellant to deliver forthwith to respondent the two buses or alternatively that pending the return day of the rule nisi, the Deputy Sheriff attach and hold the two buses in safe custody. Respondent also claimed payment of the arrear amounts due on cancellation of the agreements.

Pursuant to the interim attachment orders, the vehicles were placed in respondent's possession by the Deputy Sheriff. The vehicles were, however, taken out of Swaziland and driven across the border into South Africa.

On the return day of the rule nisi this fact was put before the court which ordered that the vehicles be returned to Swaziland. The rule nisi was extended.

On the extended return day the appellant moved that the rule nisi be discharged and applied that the respondent be ordered, by reason of the removal of the vehicles from Swaziland, that it should pay appellant's costs on an attorney and client scale. In moving for the discharge of the rule nisi the appellant took a number of points in limine, the most important of which was that the agreements provided that the South African Credit Agreements Act No. 75 of 1980 applied to

the two contracts. It also contended that as the vehicles had been taken out of Swaziland, the High Court of Swaziland no longer had jurisdiction to confirm their attachment or to make the other orders sought by the respondent.

The learned Judge hearing the natter dismissed the point in limine but made an order as to one of the vehicles. I shall refer to that order in due course. It is against those findings that the appellant now comes on appeal to this Court.

Although lengthy heads of argument were prepared - not by Mr. Kades, who appeared for the appellant - on the point in limine as to the applicability of the Credit Agreements Act, Mr. Kades quite correctly in my opinion, did not pursue the point in this Court. I need therefore say no more about why the Court dismissed it.

The appeal was therefore directed solely to the order made by the court a quo.

In ordering the return of the vehicles to Swaziland, the learned Judge made it clear to the respondent that if the buses were not in the Swaziland jurisdiction on the extended return day, the rule nisi would be discharged. On the extended return day one of the two buses broke down on its way to Swaziland and was not before the court. The court a quo ruled that it therefore had no jurisdiction over that vehicle. The respondent, it held, had voluntarily removed it and in respect thereof the rule was discharged.

The factual position in regard to the second vehicle, which was the Mercedes Benz OF 1624 passenger bus, was that on the extended return day there was a bus parked outside the court, said to be that bus. It had, however, been repainted and refurbished and appellant said it was not the same bus.

There was no evidence as to engine number of the bus but the chassis number was the same as that of the bus which was the subject of the Rental Agreement. The learned Judge's judgment in the court a quo as to that vehicle reads as follows:

"In respect of the vehicle referred to in 2.2.2. in view of the uncertainty as to whether the vehicle is before the court or not, I cannot confirm the attachment which has taken place, but as far as the merits of the matter is concerned, for the reasons I have given, it is clear on the merits the points raised in limine must fail the vehicle is clearly one according to the affidavits which is designed to carry more than 15 passengers. The provisions of the Credit Agreements Act do not apply to this vehicle and the other relief claimed by the applicant is competent. The respondent is therefore ordered to make payment to the applicant of the amount of E23 441.72 and to return the vehicle described in Paragraph 2.2.2. of the Notice of Motion to the Applicant.

As far as costs as concerned, in view of the way in which the Applicant has dealt with the vehicles which were entrusted to it under the interim order I am not prepared to make any costs as a sign of my disapproval and I order that the costs of opposition be paid by the Applicant to the Respondent."

Mr. Kades argued that the learned Judge erred in making the order he did and should have

discharged the rule nisi as he did in regard to the other bus, the subject of the Instalment Sale Agreement. The Court had ordered the return of a vehicle over which doubt existed as to whether it was in the jurisdiction of the court or not.

I do not think that contention is sound. Although the attachment of the vehicles could not stand or be confirmed because the one was no longer in Swaziland, and therefore not amenable to further attachment, and doubt existed as to whether the bus is Swaziland was the subject of the Rental Agreement, the Court clearly had jurisdiction, and was entitled to make orders, in respect of the other relief claimed.

The appellant is an incola of Swaziland and therefore obviously subject to the jurisdiction of the Court.

It did not dispute its default in its payments under the Rental Agreement. The orders sought against it, including the return of the bus, the subject of that agreement, could therefore competently be made. If the bus outside the Court was that bus then it would go back to respondent. If not,

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it was in any event a bus belonging to respondent. No prejudice could therefore result to appellant by the order for the return of the bus.

As to the counter claim which, Mr. Kades submitted, the learned Judge had overlooked, the learned Judge said he could not find positively that by removing the buses from Swaziland the respondent had acted in contempt of court. This Court cannot hold, therefore, that the Court a quo was wrong in making the costs order it did.

The appeal is dismissed with costs.

(Signed)

TEBBUTT J.A.

(Signed)

KOTZE' P.: I agree

(Signed)

STEYN J.A. I agree