

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.28/02

In the matter between:

MIKE MAMBA APPELLANT

VS

FIDELIS DE SOUSA RESPONDENT

CORAM LEON JP

STEYN JA

TEBBUTT JA

FOR THE APPELLANT : MRS. MCHUNU

FOR RESPONDENT : MR. J.S RODRIGUES

JUDGMENT

22/11/2002

Tebbutt JA:

In the High Court the present respondent obtained an order on notice of motion that a certain Ford Telstar motor car which was in the possession of the police be returned to him. Respondent alleged in his founding affidavit that he was the owner of the vehicle and that it has been forcibly removed from his possession by the appellant who had handed it to the police. The appellant opposed the application on the basis that the respondent was not owner of the vehicle. It was in fact a stolen car and the respondent knew it was. The latter had handed it over to him, the appellant, voluntarily so that he could place it in the hands of the police. The court a quo found that respondent's claim was a vindictive one for the delivery of the vehicle which was owned by him and which was in the possession of the police. There was,

2

said the Judge in the court a quo really no reason at all why the police should not hand it over to the respondent. It was therefore ordered accordingly and the appellant was also ordered to pay the costs. It is against those orders that the appellant comes on appeal to this Court.

In my view this was a case in which the learned Judge should not have made the order he did. I say this because of the many disputes of fact contained in the affidavits of the appellant and the respondent in the motion proceedings.

The facts reveal a somewhat strange story. It appears that on 7th December 2001 at Manzini the appellant, the respondent, one Danny Kruger and one Issufo "Papillon" Marifo ("Papillon") were all gathered together at the latter's garage, known as PM Motors. The appellant expressed an interest in a BMW motor car parked there which Kruger said belonged to him. The appellant and

Kruger then entered into an agreement in terms of which the appellant exchanged for the BMW three vehicles including the Ford Telstar. The respondent then, according to the respondent and Pabilon, bought the latter vehicle from Kruger for an amount of E30,000, paying E15, 000 there and then and undertaking to pay the balance two weeks later. Respondent took delivery of the vehicle. Appellant denied that the respondent bought the vehicle from Kruger. He said that he handed over three vehicles, including the Ford Telstar, to Kruger in exchange for the BMW car. He later found that the BMW was a stolen vehicle when the Manzini police confiscated it from him. He went to Kruger to reclaim his three vehicles, averring that Kruger had defrauded him. Kruger gave him back one of the vehicles and told him that he could not return the Ford Telstar to him as he had given it to Pabilon as commission for facilitating the exchange transaction between him and the appellant. Pabilon had given it to the respondent who was his nephew.

Respondent and Pabilon in separate affidavits denied these allegations.

3

It will be immediately appreciated that what I have so far set out reveals a clear dispute of fact as to whether the respondent was the owner of the Ford Telstar. If respondent had not bought the vehicle he, appellant, remained the owner of it. Appellant said he supplied the police with the necessary documents proving his ownership.

Appellant further averred that at the time he demanded his vehicles back from Kruger, the latter told him that both Pabilon and the respondent were aware that the BMW was a stolen car and that he was being defrauded. This, he contended, made the respondent a mala fide possessor of the Ford Telstar. Again these facts were denied by Pabilon and the respondent but once more a dispute of fact has arisen on the papers.

Respondent further alleged that he was entitled to the return of the vehicle as he had been forcibly dispossessed of it by the appellant on 27th April 2002 when the latter stopped him while he was driving with his wife in Fairview South main road and in an aggressive and threatening manner forcibly took the keys of the car from Mm and drove off in the vehicle, after ordering him to remove his luggage and certain groceries from the boot of the car. He filed a confirmatory affidavit by his wife. Appellant's version of all this is that after Kruger told him that Pabilon had given the vehicle to respondent he searched for the latter for some time and eventually found him on 27th April 2002, driving the vehicle. He stopped him and told respondent what had happened in regard to the exchange transaction. He told respondent that he wished to take the vehicle to the Manzini police and the respondent then voluntarily removed his personal effects from the car and handed the vehicle over to him. He then took it to the police.

Once again a clear dispute of fact arose on the papers as to how respondent came to be dispossessed of the vehicle.

On all the foregoing, whether the respondent sought to claim the return of the vehicle to him on the basis of the rei vindicatio or of spoliatio, the factual foundation for his claim was so extensively

4

disputed fundamentally challenged that an order on the papers alone, without hearing oral evidence in regard to the facts, should in my view-not have been made.

Mr. Rodrigues for the respondent submitted that the probabilities so favoured the respondent that the court a quo was entitled to make the order it did.

The approach of the courts where factual disputes arise in motion proceedings is well settled both in South Africa and in Swaziland. In *SEWUMNGAL AND ANOTHER NNO V REGENT CINEMA* 1977(1) SA 814 (N). Leon J, as he then was, at 818G-821E comprehensively reviewed the authorities on the topic and warned against the danger of settling disputes of fact solely on the probabilities emerging from the affidavits without giving any or due consideration to the advantages of viva voce evidence. He cited with approval the well-known passage from the case of *ROOM HIRE COMPANY (PTY) LTD V JEPPE STREET MANSIONS (PTY) LTD* 1949(3) SA 1155 (T) at 1162 which reads thus:

"inasmuch as the ascertainment of the true facts is effected by the trial Judge, on considerations not only of probability but also of credibility of witnesses giving evidence viva voce, it has been emphasized repeatedly that (except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits in disregard of the additional advantages of viva voce evidence.."

Suwumngal's case has been approved by the South African Appellate Division in *TRUST BANK VAN AFRIKA BPK V WESTERN BANK BPK en ANDERE NNO* 1978(4) SA 281 (AD) at 294 D - E and *ADMINISTRATOR TRANSVAAL AND OTHERS V THELETSANE AND OTHERS* 1991(2) SA 192 (AD) at 197 B - C.

This approach has been adopted in cases in Swaziland as well. (See e.g. the Court of Appeal decision in *SIBONGILE NHLENGETHWA V AFINTA FINANCIAL SERVICES CIVIL APPEAL NO. 19/2000 UNREPORTED*).

5

Applying the approach to the present case I am of the view that the matter should not have been decided on the affidavit but should have been referred to trial for the hearing of oral evidence.

It was the appellant's submission on appeal that the learned Judge a quo erred in granting the order he did on the affidavits and should have called for oral evidence before coming to a decision in the matter. In the light of what I have set out above, that submission is well founded. The following order is therefore made:-

1. The appeal succeeds with costs.
2. The order of the High Court dated 3rd June 2002 is set aside.
3. The matter is referred back to the High Court for the hearing of viva voce evidence, the affidavits to stand as pleadings in the matter. Either party may, in addition, call any other witness it may wish to testify provided a summary of such witness's evidence is furnished to the other party no later than 7 days prior to the hearing.
4. The costs of the application in the High Court and of the hearing set out in Paragraph 2 above are to be determined by the Court at the hearing.

DELIVERED IN OPEN COURT THIS 22nd DAY OF NOVEMBER 2002

P.H. TEBBUTT

JUDGE OF APPEAL

R.N. LEON

JUDGE PRESIDENT

6

J.H. STEYN

JUDGE OF APPEAL