

**IN THE SUPREME COURT OF APPEAL OF SWAZILAND**

In the matter between

CIV.APPEAL NO. 34/2007

**MELUSI QWABE N.O.**

**FIRST APPELLANT**

**SWAZILAND UNITED BAKERIES**

**(PTY) LTD**

**SECOND APPELLANT**

**And**

**SABELO M. MASUKU NO.**

**(in his capacity as Liquidator of**

**TAKITSI CONTRACT CATERERS**

**(PTY) LTD)**

**RESPONDENT**

**CORAM**

**BAND A, CJ**

**RAMODIBEDI, JA**

**FOXCROFT, JA**

**FOR THE APPELLANTS:**

**MR. Z. SHABANGU**

**FOR THE RESPONDENT:**

**MR. L. HOWE**

**HEARD ON:** 14 MAY 2008

**DELIVERED ON:** 22<sup>nd</sup> MAY 2008

## **JUDGMENT**

**FOXCROFT, JA**

The Respondent, in his capacity as Liquidator of TAKITSI CONTRACT CATERERS (PTY) LTD, applied for a stay of a sale in execution and delivery of an ISUZU truck registered as SD 829 TN.

These prayers were granted with costs when the Court *a quo* gave an order in terms of the Notice of Motion. The stay of the sale and order for delivery to the Liquidator were ordered to operate in the interim pending "the finalisation of this application".

Appellant claims that the order for delivery of the Isuzu, although interim in nature, was final in effect and that leave to appeal to this Court was therefore not required. Respondent resists this contention submitting that the appeal is not properly before this Court, since leave to appeal has not been granted.

No Court order is before us but Mr. Shabangu, who appeared for the appellants, informed us from the Bar that no recording can be found of

the order which, he assured us, was made by the learned Judge *a quo*. Mr. Howe, for Respondent agreed that the interim orders sought in the Notice of Motion were made in the Court below, and the matter proceeded on that basis.

For convenience, and to avoid confusion, I shall refer to the Respondent as the Liquidator, First Appellant as the Deputy Sheriff (for the District of Manzini) and Second Appellant as Swaziland United Bakeries.

Swaziland United Bakeries who had obtained a judgment for E1 61, 376 - 71 against Takitsi Contract Caterers issued a Writ of Execution and Notice of Sale in respect of the ISUZU. In the writ directed to the Deputy Sheriff, he is directed to;

*"attach and take into execution the movable goods of Takitsi Contract Caterers ... ". (annexure SM3).*

The Notice of Sale which follows (annexure SM4) itemizes the goods to be sold pursuant to the writ as;

*" 1 xISUZULDV-SD 829 TN".*

The Liquidator deposed to the fact that having seen the sale advertisement in the newspapers he wrote to Swaziland United Bakeries' lawyers, informing them of his appointment as Liquidator and making the point that the Isuzu belonged to the insolvent company (TAKITSI).

He also informed them of his obligation in terms of the Companies Act, 7 of 1912 to keep in his custody all the company property, and requested them to cancel the sale and return the vehicle to him.

No reply was forthcoming to that letter or a further letter the next day (24<sup>th</sup> October 2007).

An answering affidavit by one Michelo Shabangu, a manager employed by SWAZILAND UNITED BAKERIES asserts that the motor vehicle in question was surrendered to his firm and the Deputy Sheriff by one Siphso Thwala on the 1<sup>st</sup> August 2007, and that notices to sell the vehicle in execution appeared prior to the liquidation order. The Isuzu had, according to Shabangu been pledged as security by Thwala. He added that the real owner of the vehicle was Fikile Bulunga and that he had informed the Liquidator of the claims to the Isuzu.

In a supporting affidavit in a related case, incorporated by reference

(record 84) Fikile Bulunga claims to be the owner of the Isuzu. How Thwala pledged the vehicle which he claimed did not belong to him, is not explained.

The manager of Swaziland United Bakeries asserts in his answering affidavit that the order for delivery of the Isuzu to the Liquidator "seeks to permanently defeat the right to the vehicle obtained by the Respondents through a pledge."

Mr. Zweli Shabangu, who appeared for Swaziland United Bakeries echoed this approach resisting any suggestion that the delivery order was an interim one pending finalization of the application. He would not accept that placing the Isuzu in the hands of the Liquidator on an interim basis, amounted to an order for the safekeeping of the vehicle by an officer of the Court. A Liquidator, of course, operates by the authority and under the control of the Master of the High Court, in a position of trust.

The *status quo*, in the face of conflicting claims, has in fact been preserved by the delivery of the vehicle *pendente lite* into the custody of the Liquidator.

Costs of the successful interim application were correctly awarded by

the Court *a quo*.

In the light of these findings, the "appeal" for which no leave had been sought, was not properly before this Court.

It is struck from the roll with costs.

J.G. FOXCROFT

I agree

R.A. BANDA C.J

I agree

M.M. RAMODIBEDI J.A.