



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No: 62/2013

In the matter between:

NELSON LOKOTFWAKO N.O.
SIPHIWE SIBANDZE

FIRST APPELLANT
SECOND APPELLANT

VS

JERRY DUMSANI NXUMALO
MDUDUZI VILAKATI

FIRST RESPONDENT
SECOND RESPONDENT

Neutral citation: *Nelson Lokotfwako N.O. & Another vs Jerry Dumsani Nxumalo & Another (62/2013) [2014] SZSC32 (30 May 2014)*

CORAM:

M.M. RAMODIBEDI, CJ
S.A. MOORE, JA
M.C.B. MAPHALALA, JA

Heard
Delivered

19 May 2014
30 May 2014

Summary

Civil Appeal – Property Ownership – a contract of sale was concluded between the second appellant and the second respondent in terms of which the second respondent sold a motor vehicle to the second appellant – the contract was subsequently terminated due to the failure of the second respondent to deliver the motor vehicle to the second appellant - second appellant sued for the return of the purchase price – default judgment was subsequently obtained by second appellant to recover the purchase price paid – a motor vehicle in the

possession of the second respondent was attached by the first appellant in his capacity as deputy sheriff to satisfy the judgment debt – first respondent lodged motion proceedings for the return of the motor vehicle from the first appellant on the basis that the motor vehicle is leased to him by Standard Bank Swaziland Limited – the court *a quo* granted the application on the basis that the motor vehicle is registered in his name and upon proof that he was leasing the motor vehicle on a hire-purchase contract from a commercial bank – held that the documents constitute proof that the bank was the owner of the motor vehicle and that the bank has leased the motor vehicle to the first respondent – appeal is allowed to the extent that the judgment *a quo* is set aside.

JUDGMENT

M.C.B. MAPHALALA J.A.

[1] A verbal contract of sale was concluded on the 1st July 2010 in terms of which the second respondent sold a motor vehicle to the second appellant at a purchase price of E50 000-00 (fifty thousand emalangeni). It was a material term of the contract that the motor vehicle would be delivered to the second appellant by the second respondent on the 30th July 2010. Similarly, the purchase price was payable on the 30th July 2010.

[2] It is common cause that on the 2nd July 2010 the second appellant paid into the second respondent's bank account a deposit of E15 000.00 (fifteen thousand emalangeni); and, on the 26th July 2010, the second appellant paid an additional deposit of E25 000.00 (twenty five thousand emalangeni) into the second

respondent's bank account; these monies were paid in respect of the purchase price. However, on the 30th July 2010, the second respondent repudiated the contract by failing to deliver the motor vehicle to the second appellant in accordance with the terms of the contract. Accordingly, the second appellant accepted the repudiation of the contract and sued for the recovery of the purchase price paid in the sum of E40 000.00 (forty thousand emalangeni).

[3] Judgement by default was granted against the second respondent on the 18th March 2011 in respect of E40 000.00 (forty thousand emalangeni), interest thereon at the rate of 9% per annum *a tempore morae* as well as costs of suit. A writ of execution was subsequently issued on the 28th March 2011 for the attachment of movable goods belonging to the second respondent and cause them to be sold by public auction to realise the judgment debt. On the 19th June 2011, the first appellant in his official capacity as the deputy sheriff attached a motor vehicle, being a Nissan Double Cab registered BSD 527 BH which was found in the possession of the second respondent; and, a Notice of Attachment of Movable Property was accordingly filed in court by the first appellant.

[4] Pursuant thereto the first respondent lodged an application in the court *a quo* for an order directing the first respondent to surrender and deliver to him the attached motor vehicle. He further sought an order directing the first appellant not to proceed with the sale by public auction of the attached motor vehicle.

[5] The first respondent contended that the attached motor vehicle was owned by him, being a subject of a Hire Purchase Agreement concluded between himself and Standard Bank of Swaziland Limited on the 14th December 2011. He argued that he had a proprietary right to the motor vehicle in terms of the agreement. He argued that the motor vehicle was in the possession of the second respondent by his consent. He annexed a Registration Document of the motor vehicle bearing his name. Similarly, he handed to court the Hire-Purchase Agreement together with the Delivery Note of the motor vehicle as well as bank statements showing debit entries in the first respondent's bank account in respect of the payments of the motor vehicle. The documents constitute conclusive proof that the motor vehicle was owned by the bank and that the first respondent has leased the motor vehicle from the bank. However, in paragraph [15] of her judgment the learned Judge *a quo* misdirected herself in her finding that there was conclusive proof to the effect that the first respondent, as applicant, was the "owner of the merx". It is trite law that in a Hire Purchase Agreement Ownership does not pass to the purchaser until payment of the last instalment. It is common cause that there is still an outstanding balance of E179, 882.00 (one hundred and seventy-nine thousand eight hundred and eighty-two emalangeni), thus leaving the Standard Bank of Swaziland Limited as the owner still. The court accepted these documents as proof of ownership of the motor vehicle by the bank and granted the application.

[6] In her answering affidavit the second appellant challenged the procedure by the first respondent in instituting the proceedings. She contended that the first respondent and the first appellant ought to have agreed to institute interpleader proceedings in terms of Rule 58 of the High Court Rules. She further contended that the first appellant ought to have tendered delivery of the attached motor vehicle to the Registrar of the High Court on the basis that there were competing claims on the ownership of the motor vehicle and urged the court to determine the true owner. In terms of Rule 58 it is the first appellant who was obliged to institute interpleader proceedings and not the first respondent; however, it is common cause that the first appellant failed to comply with his obligations in terms of Rule 58 of the High Court Rules. However, such a failure by the first appellant to institute interpleader proceedings cannot be adverse to the first respondent in the circumstances.

[7] Rule 58 provides the following:

“58. (1) Where any person, in this rule called “the applicant”, alleges that he is under any liability in respect of which he is or expects to be sued by two or more parties making adverse claims, in this rule referred to as “the claimants”, in respect thereto, the applicant may deliver a notice, in terms of this rule called an “interpleader notice”, to the claimants. In regard to conflicting claims with respect to property attached in execution, the deputy sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant.

- (2) (a) Where the claims relate to money the applicant shall be required, on delivering the notice mentioned in sub-rule (1) hereof, to pay the money to the Registrar who shall hold it until the conflicting claims have been decided.
- (b) Where the claims relate to a thing capable of delivery the Applicant shall tender the subject matter to the Registrar when delivering the interpleader notice or take such steps to secure the availability of the thing in question as the Registrar may direct.
- (c) Where the conflicting claims relate to immovable property the applicant shall place the title deeds thereof, if available to him, in the possession of the Registrar when delivering the interpleader notice and shall at the same time hand to the Registrar an undertaking to sign all documents necessary to effect transfer of such immovable property in accordance with any order which the court may make or any agreement of the claimants.
- (3) The interpleader notice shall —
- (a) state the nature of the liability, property or claim which is the subject-matter of the dispute;
- (b) call upon the claimants within the time stated in the notice, not being less than fourteen days from the date of service thereof, to deliver particulars of their claims; and
- (c) state that upon a further date, not being less than fourteen days from the date specified in the notice for the delivery of claims, the applicant will apply to court for its decision as to his liability or the validity of the respective claims.
- (4) There shall be delivered together with the interpleader notice an affidavit by the applicant stating that —

- (a) he claims no interest in the subject-matter in dispute other than for charges and costs;**
 - (b) he does not collude with any of the claimants;**
 - (c) he is willing to deal with or act in regard to the subject-matter of the dispute as the court may direct.**

- (5) If a claimant to whom an interpleader notice and affidavit have been duly delivered fails to deliver particulars of his claim within the time stated or, having delivered such particulars, fails to appear in court in support of his claim, the court may make an order declaring him and all persons claiming under him barred as against the applicant from making any claim on the subject matter of the dispute.**

- (6) If a claimant delivers particulars of his claim and appears before it, the court may —**
 - (a) then and there adjudicate upon such claim after hearing such evidence as it deems fit;**
 - (b) order that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant;**
 - (c) order that any issue between the claimants be stated by way of a special case or otherwise and tried, and for that purpose order which claimant shall be plaintiff and which shall be defendant;**
 - (d) if it considers that the matter is not a proper matter for relief by way of interpleader notice, dismiss the application;**
 - (e) make such order as to costs, and the expenses (if any) incurred by the applicant under sub-rule (2) (b), as to it may seem meet.**

- (7) If an interpleader notice is issued by a defendant in an action,**

proceedings in that action shall be stayed pending a decision upon the interpleader, unless the court upon an application made by any other party to the action otherwise orders.”

- [8] It is well-settled that once the deputy sheriff becomes aware that there are two or more competing claims against a particular property which he has attached, he is bound to lodge an interpleader notice to the claimants failing which, he would be liable to the owner of the goods. However, he is not liable to the owner of the goods which have been attached in the possession of a judgment debtor in circumstances where he had no knowledge that the goods belong to a third party. It is further apparent from Rule 58 (7) of the High Court Rules that once an interpleader has been instituted, any action proceedings filed by the claimant is stayed pending a decision upon the interpleader.

Weeks and Another v. Amalgamated Agencies, Ltd 1920 AD 218 at 238

Nompumelelo Mkhonta and Two others v. Lewis Stores and Another Supreme Court Case No. 39/2010

- [9] Juta A.J.A. in *Weeks and Another v. Amalgamated Agencies Ltd* (supra) at 238 had this to say:

“Applying the principles of the Roman – Dutch law, and the Statute Law (Act 32 of 1917), the position of a messenger in attaching the goods of a third person seems clear. [1] If he attaches them while in the possession of the judgment debtor they are presumed to belong to the latter, and the messenger is not liable to the owner for such attachment. [2] If on

attachment or thereafter before they are sold they are claimed by a third person, his duty is to take out an interpleader summons. If he neglects to do so he is answerable to the owner of the goods. If he attaches goods not in the possession of the judgment debtor which belong to a third person, he does so at his own risk, and is answerable to the true owner. No hardship is imposed on the messenger because by Order 25, section 32 of Act 32 of 1917, if he is in doubt as to the validity of any attachment or contemplated attachment, he may require that the party suing out the process shall give security to indemnify him.”

[10] In the same judgment De Villiers AJA referring to the position of the messenger had this to say at p. 226:

“He is therefore not entitled to attach the property of third parties. If he does so he acts outside the limits of his functions and is liable The authorities are unanimous that the messenger is liable if he attaches the goods of third parties, whether there be negligence in the ordinary sense on his part or not

Only in one case is a messenger entitled to attach the property of a third party, and that is when the property is found in the possession of the debtor.”

See also the case of P. Coetzee (Sheriff, Pretoria East) and F.E. Meevis Supreme Court case no. 286/1998 where the decision of *Weeks and Another v. Amalgamated Agencies* (supra) was approved and followed by the Supreme Court of South Africa.

[11] However, the court *a quo* misdirected itself by granting costs against the first appellant in favour of the first respondent. Costs were not sought in the application before the court *a quo*. It is trite law that a litigant cannot be granted that which he has not sought in the lis.

See the cases of the *Commissioner of Police and Another v. Mkhondvo Aaron Maseko* Civil Appeal No. 03/2011 at para 5 as well as *Commissioner of Correctional Services and Ntsentselelo Hlatshwako* Civil Appeal No. 67/2009 at para 7.

[12] Accordingly, the appeal succeeds and the following order is made:

1. The judgment of the court *a quo* is set aside and substituted with the following judgment:
 - (a) The first appellant is ordered to comply with Rule 58 of the High Court Rules by delivering an interpleader notice involving all the parties including the Standard Bank of Swaziland Limited.
 - (b) The motor vehicle which is the subject matter of the dispute shall be tendered to the Registrar of the High Court for safekeeping pending the finalisation of the matter.
 - (c) There shall be no order as to costs in this court.

(d) Costs in the court below shall be costs in the cause.

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	M.C.B. MAPHALALA JUSTICE OF APPEAL
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I agree	M.M. RAMODIBEDI CHIEF JUSTICE
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I agree	S.A. MOORE JUSTICE OF APPEAL
For first Appellant	No appearance
For second Appellant	Attorney M.P. Simelane
For Respondent	Attorney M. Ntshangase

DELIVERED IN OPEN COURT ON 30 MAY 2014