



IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Appeal Case No. 12/2018

In the matter between:

THE ROTARY CLUB OF MBABANE

Appellant

and

TIHLOBOTAKHE ZULU
HAND IN HAND (SWAZILAND)

1st Respondent

2nd Respondent

Neutral Citation : *The Rotary Club of Mbabane VS Tihlobotakhe Zulu
and Hand in Hand (Swaziland) (12/2018) [2018] SZSC*

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(17/10/2018)

Coram : M.J. DLAMINI JA, R.J. CLOETE JA AND
S.J.K. MATSEBULA AJA.

Heard : 2nd OCTOBER 2018

Delivered : 17th OCTOBER 2018
SUMMARY : *Interpretation of contract – Appellant referred to as “Donor” – Respondent referred to as “User” – Court a quo found for Respondent that because use of word “Donor” contract implied a donation – Wording of contract clearly envisages right of use and not donation – Appeal upheld with costs.*

JUDGMENT

CLOETE – JA

CONDONATION

[1] The Respondent filed an Application for the late filing of Heads of Argument. The Founding Affidavit of the Counsel for the Respondent sets out all of the necessary allegations as required by this Court. Counsel for the Appellant did not oppose the Application and did not seek an order for costs. Accordingly the late filing of the Heads of Argument of the Respondent was condoned with no order as to costs.

BACKGROUND

[2] The Appellant is the Rotary Club of Mbabane which is a club not for gain registered as such in terms of the laws of Eswatini, with power to sue and be sued in its name.

- [3] The 1st Respondent is Tihlobotakhe Zulu, an adult male of Eswatini. The 2nd Respondent is Hand in Hand (Swaziland), which is a Section 21 registered company of Eswatini which is capable of suing and being sued in its own name. For the purposes of this Judgment reference will be made to the Respondent as for all intents and purposes they are one and the same entity.
- [4] The Respondent entered into a sponsorship agreement with various sponsors including The Rotary Club of Goarhausen – Loreley from Germany and Rotary Club Martin of Slovakia and which sponsorship was at all times underwritten by the Thomas Engel – Stiftung. The project was known as the MobiDik medical outreach project (“MobiDik”). For the purposes of this Judgment it is not necessary to set out itemised details of the sponsorship arrangements but reference will be made below to the termination of the sponsorship.
- [5] The Appellant and the Respondent entered into an agreement headed **Vehicle Use Agreement** and the salient features of the said agreement are the following;
- (1) The Appellant, Rotary Club Mbabane, was cited as “**the donor**”;

- (2) The Respondent was cited as **“the user”**;
- (3) The preamble stated that **“The Rotary Club of Mbabane wishes to make available the Vehicle with the following description, 2015 Toyota Fortuner, 2.5 Diesel Automatic, Registration OSD 463 BH (“the Vehicle”) to Hand in Hand Swaziland solely for the MobiDik medical outreach programme”**; (my underlining)
- (4) **“That the Vehicle with the above description is registered under the name of Hand in Hand Swaziland”**;
- (5) The agreement then set out a plethora of obligations on the Respondent to maintain the Vehicle, service it, insure it, who was entitled to drive it, the maintenance of a log book and obligations relating to the reporting of accidents to the Insurance Brokers;
- (6) Clause 5 of the Use Agreement again reiterated **“That Hand in Hand Swaziland shall use the Vehicle solely for the MobiDik medical outreach project which has been underwritten by the Thomas Engel-Stiftung”**.

[6] It is common cause that the underwriter of the sponsorship, the Thomas Engel-Stiftung, withdrew its underwriting and as such the support in writing. Counsel for the Respondents quite correctly conceded that this was the case. The following appears at Page 50 of the Record and is a communication from Ernst Engel, on behalf of the Thomas Engel-Stiftung and Mr Zulu on behalf of the Respondent;

“Dear Zulu, I have to inform you about our final decision, that we will not continue to support Hand in Hand Swaziland. We had many meetings and discussions with you to improve the situation of HiH SZ. But we cannot see any progress. Instead of professional management exists mismanagement. We have completely lost our trust in Hand in Hand Swaziland. Therefore we are forced to stop our support from now on. Best Regards, Ernst”.

[7] On the basis that the Vehicle had been made available to the Respondent solely for the purposes of MobiDik, the Appellant brought an Application before the Court *a quo* for an Order in the following terms;

(1) Directing the 1st Respondent to forthwith return and deliver the undermentioned motor vehicle to The Rotary Club of Mbabane (the Applicant), viz:-

Registration Number: OSD 463 BH
Year and Make: 2015 – D-4D, Toyota Fortuner 2.5
Year of manufacture: 2015
Type: Motor Vehicle
Chassis Number: AHT2R62930411437
Engine No.: 2KDA797823

(2) That should it be necessary the Station Commander for Nhlango Police Station, or his lawful deputy, and/or alternatively, any of their duly authorised members, be and are hereby authorised, directed and ordered to assist the Deputy Sheriff or the Applicant in repossessing the motor vehicle from the Respondent immediately this Court Order is served upon him.

(3) Granting costs of suit against the Respondents.

[8] Respondents opposed the Application and filed an opposing Affidavit and the Appellant filed a Replying Affidavit.

[9] The Court *a quo* per Justice Mabuza PJ, heard the matter and in a written Judgment dismissed the Application of the Appellant with costs.

[10] The Appellant duly filed a Notice of Appeal on the following grounds;

- (1) The *Court a quo* erred in finding that the motor vehicle in question, the subject matter in the *Court a quo*, had been donated to the Respondent.
- (2) The *Court a quo* erred finding that Annexure “A” signified and proved that the motor vehicle had been donated to the Respondent.
- (3) The *Court a quo* erred in relying only on the evidence of the Respondent and totally ignoring the evidence of the Appellant as set out in the evidence of **Antonius Johannes Maria Vriend**.
- (4) The *Court a quo* erred in fact and in law in finding that the Respondent was the owner of the said motor vehicle by virtue of the fact that the motor vehicle was registered in Second Respondent’s name.
- (5) The *Court a quo* erred in fact and in law in dismissing Appellant’s application with costs.

[11] Both parties filed Heads of Argument and that is the matter which was before us.

ARGUMENT OF APPELLANT

[12] The Court *a quo* found that the Vehicle had been donated to the Respondent by the Appellant purely on the basis of the finding of the Court at Paragraph 19 thereof that **“I am persuaded by Ms. Thwala’s argument that the word donor as it appears on Annexure “ A4” signifies that the motor vehicle was a donation”**. Counsel pointed out that the citation of the Appellant on that agreement as the donor was the only place in the entire agreement where there was any reference to a purported donation. It was clear that the agreement only proposed a right of use whilst MobiDik was in force and that the Appellant accordingly had a clear right to the return of the Vehicle upon MobiDik coming to an end for whatever reason.

[13] Furthermore, the Court *a quo* found at Paragraph 22 of its Judgment that there was a compelling case for the notion of a donation due to the fact that the Vehicle was in fact registered in the name of the Respondent and referred to the matter of **Bheki Shongwe v Contour Bedding Swaziland Ltd and Another, High Court Case No. 119/2015 (unreported)**.

[14] The Court *a quo* relied solely on the evidence of the Respondent and did not even refer in its findings to the evidence of the representative of the Appellant.

[15] As regards interpretation of a contract Counsel referred the Court to the matter of **Bastian Financial Services (Pty) Ltd v General Hendrik Schoenam Primary School 2008 (5) SA 1 (SCA)**.

ARGUMENT OF THE RESPONDENTS

[16] Counsel for Respondent was in full agreement with the Judgment of the Court *a quo* on the simple basis that because the Appellant was referred to as the donor in the Use Agreement, the Vehicle was in fact donated by the Appellant to the Respondent.

[17] Counsel correctly conceded that the Use Agreement clearly provided that the Vehicle was made available solely for the purposes of MobiDik and furthermore conceded that MobiDik had been abandoned by the Respondent for lack of sponsorship after the cancellation of the original sponsorship.

[18] She further agreed with the Court *a quo* that the registration of the Vehicle in the name of the Respondent was an indication that the Vehicle was in fact

intended for permanent use by the Respondent and that change of ownership was implied.

FINDINGS

[19] The Use Agreement is in my view clear and unambiguous in that it specifies in the heading itself that it is a Use Agreement, further recording that the Appellant makes the vehicle available for use by the Respondent solely for MobiDik, whilst describing the Appellant as the donor, it does not describe the Respondent as the donee and in fact nowhere else in the Use Agreement is there any reference to a donation or the donor or the donee.

[20] As was pointed out in **Bastian Financial Services, supra**, “**Interpretation is the process of attributing meaning to the words used in the documents, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the documents as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent**

purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be argued in the light of these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermined the apparent purpose of the documents. Judges must be alert, to guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for words actually used...To do so...in a contractual context is to make a contract for the parties other than the one they in fact made”.

(My underlining)

- [21] Based on the above, on a proper reading and interpretation of the Use Agreement, it can only be interpreted on a sensible, businesslike basis that the Agreement provided only for the use of the vehicle solely for the purpose of a specific project and that the Respondent had the various obligations set out in the agreement relating to the Vehicle. In fact it is pertinent to note that not only in the preamble but again in the body of the agreement it clearly specifies that the Vehicle shall be used solely for the MobiDik project. (My underlining)

[22] It then follows that if the specific project for which the sole use was granted was terminated, the rationale for the sole use would cease and the Appellant would then be entitled to a return of the Vehicle. As conceded by Counsel for the Respondent and as set out in the email referred to *supra*, the project ceased because of the withdrawal of the sponsorship.

[23] Furthermore, if the above was not the intention of the parties, then surely Clause 1 of the Use Agreement would specifically have provided that the ownership in and to the Vehicle would pass to the Respondent. But it does not do that. It merely states that the Vehicle would be registered in the name of the Respondent and then sets out the plethora of obligations of the Respondent relating to the use of the Vehicle as referred to above.

[24] Given the above, in my view, with respect, the Court *a quo* misdirected itself by superficially finding in isolation that the use of the word “donor” alone meant that the Vehicle was donated. The Court *a quo* simply ignored all the surrounding facts and the balance of the unambiguous provisions of the Use Agreement to the effect that the Vehicle was made available solely for the use of a specific project, which specific project had been discontinued. The Court *a quo* appeared to simply ignore the evidence of the Appellant relating to the factual position.

[25] As regards the issue of registration of the motor vehicle in the name of the Respondent, it is necessary to refer to the following;

- (1) In the **Bheki Shongwe** matter, in fact referred to in the Judgment of the Court *a quo*, it was in fact found by Fakudze J that **“Respondent’s Counsel is also failing to appreciate that there is a difference between conclusive proof of ownership and prima facie proof of ownership. Conclusive proof cannot be disputed at all, whereas prima facie proof can be disputed by bringing evidence that proves otherwise”**.
- (2) Fakudze J further referred to the matter of **Jerry Dumsane Nxumalo v Nelson Lokotfwako N.O. and 2 Others (235/2011) 2013 SZHC 222**, where he stated that **“The Court held that in as much as the blue book was in Applicant’s name, this was not conclusive proof of ownership. Proof of ownership is quite a different kettle of fish altogether”**.
- (3) Fakudze J further refers to **Mbhekwa Mthethwa v Winile Dube and Others SC Case No. 79/12** where Maphalala MCB AJ observed **“... this is important when bearing in mind that the registration of a motor vehicle in the name of an individual constitutes prima facie**

evidence of ownership in the absence of extrinsic evidence to the contrary”.

[26] In my view there is clear extrinsic evidence which points to the fact that ownership in the Vehicle did not at any point pass to the Respondent, on the contrary the Use Agreement and the evidence of the Appellant make it clear that;

- (1) The Use Agreement clearly envisages the sole use of the Vehicle for a specific project;
- (2) The Use Agreement does not provide for the transfer of ownership but merely of registration which is coupled to a host of obligations relating to the use which would never be imposed if the intention was that ownership would pass;
- (3) The specific project having been abandoned and as such the right of use being terminated, it is in my view clear that there is no basis whatsoever for the notion that ownership in the Vehicle passed to the Respondent;

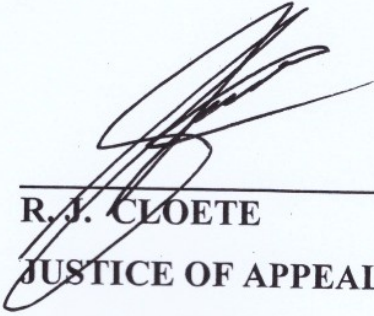
[27] Accordingly the argument of the Respondent in that regard cannot be sustained.

[28] Accordingly the appeal of the Appellant must succeed on all the grounds raised by it.

[29] At the initial hearing of the matter, this Court issued an *ex tempore* preservation Order in terms of which the Station Commander of the Nhlanguano Police Station was instructed to retain and preserve the Vehicle pending the outcome of this appeal being communicated to him by an Order of this Court.


JUDGMENT

1. The Appeal is upheld with costs.
2. The Station Commander of the Nhlanguano Police Station is hereby ordered to release the motor vehicle being **2015 Toyota Fortuner, registration number OSD 463 BH** to the Appellant or its representatives.




R. J. CLOETE
JUSTICE OF APPEAL

I agree



M.J. DLAMINI
JUSTICE OF APPEAL

I agree



S.J.K. MATSEBULA
ACTING JUSTICE OF APPEAL

For the Appellant : A. M. LUKHELE

For the Respondents : C. THWALA