



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CIVIL APPEAL CASE NO. 08/2016

In the matter between:

SIMANGA GINA

Appellant

And

CLEMENT SIMELANE

Respondent

*Neutral Citation: Simanga Gina vs Clement Simelane [08/2016] [2019] SZSC 53
(28 November 2019)*

Coram: MCB Maphalala CJ, SJK Matsebula AJA and J Currie AJA

Heard: 2 October 2019

Delivered: 28 November 2019

Summary: *Civil Law – Law of Property – Court orders attachment of property without determination of rights or interests to such property – possession and ownership – at hearing both counsel contended that the case has been overtaken by events – Court concerned about issuance of orders without determining whether the proceedings are based on mandament van spolie or rei vindicatio – property rights are protected*

by the Constitution – matter before court prematurely – dismissed with no order to costs.

JUDGMENT

SJK Matsebula AJA

Background

[1] This is an appeal from the ruling of Nkosi J. in the court *a quo* wherein the Honourable Judge had made a ruling that a certain motor vehicle forming the subject matter of the dispute should be returned to the Respondent herein. The case of the disputed car started from the Lubombo Magistrate's Court, and moved to the High Court and is now before this Court.

[2] From the papers filed before this Court the following case unfolds-

(a) The Appellant, Simanga Gina, is married to one Gcebile P. Dlamini under Siswati Law and Custom. Gcebile P. Dlamini is not party to these proceedings but is the genesis of the dispute and was a party at the Magistrate's Court as an Applicant.

(b) Gcebile P. Dlamini applied and was granted a personal loan from Nedbank and purchased a car, being an Isuzu KB 250 an LDV vehicle which is the subject-matter of this appeal. She did not use the car as she had another one but her husband used it for his errands. When they became estranged as husband and wife, Gcebile sought a court order from the Lubombo Magistrate's Court to take

possession of the car as its owner. There were an interim and final orders in the Magistrate Court but the underlying fact is that as she was granted possession of the car under the first order, she sold and transferred “ownership” of the car to Mr. Clement Simelane, the Respondent herein, after receiving the full purchase price as agreed upon.

- (c) On the return date of the first rule *nisi* at the Magistrate’s Court, the Court restored “possession” of the car back to the husband, Mr Simanga Gina, the Appellant herein. When the Magistrate’s Court issued this order, the car had already been sold and delivered to the Respondent. The Deputy Sheriff of the Region acting or purporting to be the Messenger of the Court forcefully seized the car from the Respondent on behalf of the Appellant. The issue of “possession” vis-a-vis “ownership” was not determined by the Magistrate’s Court. Possession refers to a right to physical custody or control of an object or thing whilst ownership refers to the right which grants a thing or object to a person in a manner that the thing belongs to that person.
- (d) The Respondent approached the High Court which ruled that the –

“(i) the proceedings before the Lubombo Magistrate’s Court were flawed;

(ii) the attachment of the car from the Respondent by the Deputy Sheriff was unlawful;

(iii) the Respondent was an innocence bona fide purchaser; and

(iv) finally ordered that the car should be restored to the possession of the Respondent.”

[3] The Appellant being dissatisfied with the ruling of the court *a quo* filed an appeal to this Court in the following terms-

“1. The Learned Judge, His Lordship Justice Nkosi erred and/or misdirected himself in making his ruling primarily on points which were never a ground for the Respondent’s application in its Founding Affidavit.

2. The Learned Judge in the court a quo erred and/or misdirected himself in considering such points and making pronouncement upon them regardless of the fact that the court a quo had not been called upon to make any such pronouncements.

3. The Learned Judge in the court a quo erred in law and in fact in ruling that the attachment complained of by the Respondent was unlawful, when in fact same attachment was made pursuant to and under an Order of Court.”

[4] It must be noted that, after the ruling by the court *a quo*, that the car should be returned to the Respondent, the Deputy Sheriff did not return the car to the Respondent but left it at the premises and under the control of the Nhlanguano Police Station. The reason for the non-compliance with the court

order *a quo*'s ruling by the Deputy Sheriff was that since the ruling of the court *a quo* had been appealed upon by the Appellant, it was convenient, for the Deputy Sheriff, to keep the car at the Nhlangano Police Station until the appeal has been prosecuted to finality. The court's ruling was issued on the 9th February, 2016.

[5] On the 13th May 2016, the Appellant filed a Notice of Application seeking condonation for the late filing of the Record of Appeal in terms of Rule 17 and for the late filing of the Heads of Argument. The reason given for the the failure to file the record timeously was that, notwithstanding several requests by the Appellant to the Registrar of the court *a quo*, up to the present, there is still no written judgment on the matter. There is a "Ruling of the court" *a quo* delivered on the 8th February, 2016 wherein at page 4 the court *a quo* ruled that the car immediately be restored to the possession of the Applicant, the Respondent herein.

[6] On the 24th May 2016 the Respondent filed a Notice of Motion seeking an order that-

"1. That this Honourable Court condones Respondent's late filing of this application.

2. That the appellant's appeal is deemed to have been abandoned and is hereby dismissed with costs.

3. The appellant is ordered to pay costs of the application."

- [7] It must be noted here that whilst the car was supposed to be kept or stored at the Nhlanguano Police Station, the Appellant, as a police officer, was able to convince his colleagues to release or allow him to take possession of the car. He has been using the car, presumably, from 2016 to date.
- [8] The matter was finally set down before this Court and was heard on the 2nd October, 2019. Both counsel for the litigants informed this Court that the matter had been overtaken by events since the Respondent had decided to recover the purchase price of the motor vehicle from the seller, Gcebile Dlamini, hence they were no longer pursuing the case. The only issue remaining, according to them, was the issue of costs. The application for condonation for non-compliance with the Rules of this Court and the merits of the appeal were no longer pursued.
- [9] As a way to bring the matter to finality and closure, the Respondent prayed that the matter be declared abandoned as per his Notice of Motion so as to get his costs whilst the Appellant was satisfied that he had the possession and use of the said motor vehicle, in defiance of the Ruling of the court *a quo* which had not been overturned. When the court *a quo* ruled that the car should be returned to the Respondent, the Deputy Sheriff did not do so but placed it under the care and control of the Nhlanguano Police Station which for unexplained reasons released it to their colleague, the Appellant for his personal use, benefit and enjoyment in contravention of the ruling of His Lordship, Justice Nkosi. The Appellant has been using the car for his own benefit for the past three years or so if one considers the date of the ruling of the court *a quo*.

[10] In addition to the usual practice or prayer that the “court may grant the Respondent or Applicant further and/or alternative relief”, this Court has the power and authority conferred on it by Section 146 (3) of the Constitution of Eswatini which provides as follows –

“Jurisdiction of Supreme Court (General).

146. (1)The Supreme Court is the final Court of Appeal. Accordingly, the Supreme Court has appellate jurisdiction and such other jurisdiction as may be conferred on it by this Constitution or any other law.

(2)Without derogating from the generality of the foregoing subsection, the Supreme Court has —

(a) such jurisdiction to hear and determine appeals from the High Court of Swaziland and such powers and authority as the Court of Appeal possesses at the date of commencement of this Constitution; and

(b) such additional jurisdiction to hear and determine appeals from the High Court of Swaziland and such additional powers and authority, as may be prescribed by or under any law for the time being in force in Swaziland.

(3) Subject to the provisions of subsection (2), the Supreme Court has for all purposes of and incidental to the hearing and determination of any appeal in its jurisdiction the power, authority and jurisdiction

vested in the court from which the appeal is brought. (my underlining)

- [11] The underlined words emphasize the fact that this Court, is also vested with the power of the High Court where this appeal emanated from. With that explained, this Court is of the opinion that the court *a quo* should have enquired into the issue of ownership of the car, either before or after, setting aside the proceedings before the Magistrate's Court as flawed and unlawful. It is for this reason that this Court is of the strong view that the matter came to this Court prematurely. The proceedings before the Magistrate's Court as well as before the High Court avoided the question of ownership of the motor vehicle. In terms of our law an owner has better rights to the property than a possessor.
- [12] On consideration of the papers filed before this Court it emerges that the husband claims to be the possessor and, at other times, he claims to be the owner of the car by virtue of a Siswati Law and Custom marriage to his wife. The wife on the other hand claims to be the owner of the car and to that end she filed proof that she obtained a personal loan from Nedbank to purchase the car for herself. The husband does not dispute this but says she did so on his insistence and in any event he married her under Siswati Law and Custom, which invariably means, since she is his wife, any property she buys belongs to him. In this case the two are estranged and the new developments submitted by both attorneys are that, the wife is now being sued by the Respondent for the return of the purchase price. There is no evidence before this Court if she has extinguished the loan for the car to

Nedbank. Unless the issue of ownership had been settled, she might find herself having paid a loan for the car and, by implication, having lost the car as well, if it can be held that customary marriages are not in community of property.

[13] The issue of ownership of the car should have been decided by the Courts below and the Courts should have been assisted by the legal expertise of the attorneys in this case so that a just decision would have been reached. Our jurisprudence would have been enriched by this case. This Court is, therefore, of the view that the matter came before it prematurely.

[14] That said, I note the observation of the court *a quo* found at paragraph [3] of the Ruling which reads-

“[3] The first thing that becomes clear regarding the whole process of depriving the Applicant of the motor vehicle is that there is no dispute between the parties that;

- a) The Siteki Magistrate’s Court had/has no jurisdiction over the matter.*
- b) The process, submitted by the Respondent’ Attorneys, to the Siteki Magistrate Court, is flawed and the Respondents, deliberately and knowingly did not serve such flawed process on the Applicant at any stage,*
- c) The 2nd Respondent is not a messenger of the Siteki Magistrate’ Court but is a Deputy Sheriff for the district (region),*

d) *There was no collusion between the Applicant and Gcebile Dlamini as regards the sale of the motor vehicle, thus is agreed as between the parties that Applicant was an innocent bona fide purchaser.*

[4] *It seems very clear that the Respondents' Attorneys somehow managed to utilize a Magistrates' Court that sits in remote Siteki for purposes of the main issues as between the 1st Respondent and the said Gcebile Dlamini. When his current Attorneys effected the erroneously granted court order from the Siteki Magistrates Court through the 2nd Respondent there was indeed foul play. The 2nd Respondent as Deputy Sheriff acted unlawfully in any event as he had no power to dispossess the Applicant of the motor."*

[15] Although no reasons were given by the court *a quo* why the proceedings were flawed from the beginning, it is clear that the dispossession of the car from the husband to the wife, the return of the car to the husband after it had been sold to a third party, which meant dispossession of the third party and finally dispossession of the husband in favour of the third party is not explained in terms of legal principles except at the stage of the High Court where the principle of innocent purchaser is mentioned and applied to protect the Respondent.

[16] This Court is not satisfied with the proceedings in the Courts below unless this question is clarified: Were the rulings based on *mandament van spolie*, a remedy available to a person who is dispossessed unlawfully of something

in his or her possession without a Court order or without the possessor's consent? The remedy focusses on protecting possession and does not protect ownership. Or were they based on the doctrine of the *rei vindicatio* which is a legal action by which the plaintiff (owner) demands that the defendant returns a thing that belongs to the plaintiff? It is an action meant to protect ownership rights. It may only be used when the plaintiff owns the thing and the defendant is impeding the plaintiff's possession of the thing.

[17] It is common knowledge that ownership bestows better rights on a thing than possession. A decision should have been made on the question of ownership as both the wife and husband claimed ownership, though in some instances the husband claimed proprietary rights over the property by virtue of his customary marriage to the wife.

[18] Rights to property are protected by the Constitution of Eswatini under section 19 and section 14.

Section (19) provides as follows –

“19. (1) A person has a right to own property either alone or in association

with others.

(2) A person shall not be compulsorily deprived of property or any interest in or right over property to any description except where the following conditions are satisfied –

- (a) *the taking of possession or acquisition is necessary for public use of in the interest of defence, public safety, public order, public morality or public health;*
- (b) *the compulsory taking of possession or acquisition of the property is made under a law which makes provision for –*
- (i) *prompt payment of fair and adequate compensation;*
and
- (ii) *a right of access to a court of law by any person who has*
an interest in or right over the property;
- (c) *the taking of possession of the acquisition is made under a court order.* (my underlining)

[19] Section 19 (1) provides that a person has a right to own property either alone or in association with others. It would have been investigated or enquired into whether the wife owned the property alone or in association with others and “the others” are most likely to be the husband or the bank which provided the loan, depending on the terms of the loan agreement.

In Section 19 (2)(c), the words “court order” should be understood to mean a court order lawfully given by a Court properly constituted and with the requisite or competent jurisdiction to hear and determine the matter. The Court *a quo* held that the Magistrate’s Court had no jurisdiction over the matter and the orders so issued were of no legal force.

[20] Section 14 (1) and (2) of the Constitution of Eswatini also provides as follows-

“14. (1) The fundamental human rights and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely –

- (a) respect for life, liberty, right to fair hearing , equality before the law and equal protection of the law;*
- (b) freedom of conscience, of expression and of peaceful assembly and association and of movement;*
- (c) protection of the privacy of the home and other property rights of the individual;*
- (d) protection from deprivation of property without compensation;*
- (e) protection from inhuman or degrading treatment, slavery and forced labour, arbitrary search and entry; and*
- (f) respect for rights of the family, women, children, workers and persons with disabilities.*

(2) The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, the Legislature and the judiciary and other organs or agencies of Government, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by the courts as provided in this Constitution”. (My underling).

[21] The other organs and agencies of Government referred to in the section definitely includes the Royal Eswatini Police Service. That being the case

the Nhlngano Police Station was bound by the court order of the court *a quo* and should not have released the car to Appellant whilst an appeal was being prosecuted. The action of the Police officers amounts to disrespect for the Constitution and contempt of the court *a quo*.

[22] It must be stressed that, from the moment the wife and the husband, each claimed ownership of the property, evidence of ownership should have been led and a determination made by the Magistrate's Court or the court *a quo* if the first Court lacked jurisdiction. This was not done and impacts negatively on justice and the blame should be apportioned to the Courts involved in this matter and the legal representatives of the litigants.

[23] Justice was simply not done to this case and it is unfortunate that this Court cannot order any remedial action as both legal representatives informed this Court at the hearing that the case has been overtaken by events and that they were therefore no longer pursuing the appeal. They were done with the case and their mandate ended there. This is so, even if this Court were to order that the matter be referred back to the court *a quo* for proper prosecution, that route is no longer open to this Court.

[24] Accordingly the Court makes the following orders –

1. The appeal is struck off the roll and may not be reinstated without leave of Court being sought and granted.
2. No order to costs is made.

S.J.K. MATSEBULA
ACTING JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

J. CURRIE
ACTING JUSTICE OF APPEAL

For the Appellant: F.M. Tengbeh from S.V. Mdladla and Associates

For the Respondent: H. Magagula from Robinson Bertram.

