IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.698/86

In the matter of

HORACE LONG	Applicant
and	
OZALID SOUTH AFRICA LIMITED	1st Claimant/Defendant
and	
ANVER MOHAMED	2nd Claimant/Plaintiff
In re:	
OZALID SOUTH AFRICA LIMITED	Execution Creditor
and	
FOURWAY AFRICA LIMITED	Execution Debtor
CORAM:	HANNAH, C.J.
FOR PLAINTIFF:	MR. ZWANE
FOR DEFENDANT:	MR. NXUMALO

J U D G M E N T

Hannah, C.J.

On 29th August, 1986 Ozalid South Africa (Pty) Ltd (the execution creditor) obtained judgment against Fourway Africa (Pty) Ltd (the judgment debtor) for the sum of E13,743.78 with interest thereon and costs. On a date which is not apparent from the papers before the Court but which may be accepted as being sometime in January 1987/ the Deputy Sheriff seized a Ford Sierra motor car and a Ford motor boat then in the custody of Dynamic Auto Services (Pty) Ltd. both of which had been delivered to them for repair by Mohamed Gora, a director of the judgment debtor, on 15th January 1987 and on or about 1st October 1986 respectively. Following the seizure of the motor car and boat Anver Mohamed claimed that both

belonged to him and not to the judgment debtor. The Deputy Sheriff thereupon issued an interpleader notice and on 8th May, 1987 the Court directed that Anver Mohamed be plaintiff in the issue raised and that the execution creditor be defendant. I shall now refer to the parties in those terms.

On 28th May the plaintiff gave evidence in support of his claim and the defendant called the two directors of Dynamic Auto Services (Pty) Ltd. 3oth Mr. Zwane for the plaintiff and Mr. Nxumalo for the defendant accepted that the following note to Order 17, rule 5 of the Rules of the Supreme Court of England, set out in the Supreme Court Practice 1985 at page 251, accurately reflects the position and practice in this Court:

"Where the applicant for relief is the Sheriff, who (as is usually the case) has seized under a writ of execution goods in the possession of the judgment debtor, the claimant is generally made plaintiff, and

the execution creditor defendant, in the issue. (Chase v Goble (1841) 2M. & G.930 per Tindal C.J., p 935). In such a case the burden of proof is on the claimant to prove his title to the goods or to the possession thereof at the time of seizure. If he can only show that they belonged to a third person, the execution creditor is still entitled to succeed, and is not defeated by the plea of jus tertii (Richards v Jenkins (1887) 18 QBD 451, C A; De Borbon v Westminster Bank (1933) 49 TLR 414, C A)."

At the conclusion of the hearing I stated that I regarded the circumstances in which the plaintiff claimed to have become owner of both car and boat as wholly suspect, that he had not established on a balance of probabilities that either was his property and that

his claim was accordingly dismissed. I also stated that I would give written reasons at a later date and this I now do.

The plaintiff is a businessman and a friend of Mohamed Gora and he testified that in July 1986 he purchased the Ford Sierra from the judgment debtor for El0,000 for the purpose of re-selling it. He produced an invoice dated 11th July, 1986 signed by Gora as proof of the purchase. He also produced a change of ownership form also signed by Gora and the car's registration book and explained that the change of ownership form was not forwarded to the Central Motor Registry, as the law requires, and the change of ownership formalities were not proceeded with to the point of having his name or the name of the company set out in the registration book, because to do so would involve the vehicle being road tested twice and he preferred to have this done on one occasion only when the vehicle was resold. As for the boat this, he said, belonged hot to the judgment debtor but to Gora and in August 1986 Gora had asked if he was interested in buying it for E18,000. Gora said that it was really worth in the region of E40.000 to E50,000 and when the plaintiff looked at it he realised it was "quite a bargain" and purchased it for the price asked. Gora gave him a signed bill of sale dated 18th August, 1986 setting out the particulars of the sale.

So far so good and if matters stopped there the Court would be bound to find that the plaintiff had made good his claim that both car and boat were his property. However, matters do not stop there because the Court also has before it the evidence of Sebastio Quintas and Josea Vilapoura, both directors of Dynamic Auto Services (Pty) Ltd. I will say at once that I regard both these witnesses as independent, credible and honest in the manner in which they gave their evidence. Mr. Zwane did suggest that perhaps they might

have an interest in the outcome of these proceedings but I am satisfied they do not. Their company has a lien increspect of work done on the car and boat and in my view that lien is not in the least affected whether the boat and car are sold in a sale in execution or are found to be the property of the plaintiff. Mr. Zwane suggests that work carried out subsequent to the seizure by the Deputy Sheriff may not be subject to the lien but if this be right, and I do not think it is, such interest as they may have would lie in the plaintiff establishing his claim, not the reverse.

Quintas said that Dynamic had had a number of dealings with the judgment debtor repairing its vehicles and they usually dealt with Gora, his wife or his driver. On 15th January, 1987 the Ford Sierra was towed to their premises and Gora said that it had had engine trouble and would they fix it. Gora made no mention of the car having been sold and it was booked in under the judgment debtor's name. He last saw Gora in about March - it appears from the evidence as a whole that Gora left Swaziland at about that time - and still no mention was made of the car having been sold. After Gora had left the plaintiff came to their workshop claiming that the car was his and produced a photo copy of a cheque for E10,000 with which he said he had paid Gora for the vehicle. Quintas told him there was nothing he could do and the car remained at the premises. The witness was adamant that a photo copy of a cheque had been produced and that he was never shown an invoice.

As for the boat, Quintas said that this was brought in by Gora at the end of September 1966 and he was

instructed to carry out a complete overhaul and charge the cost to the judgment debtor. No mention was made that the boat had been sold and indeed the day before Gora left the country he brought some Mozambicans to look at the boat and, according to Quintas, was trying to sell it

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to them for 15,000 US Dollars.

As appears from the foregoing summary of Quintas's evidence concerning his dealings with Gora over the car and the boat all indications were that both were the property of the judgment debtor and there was no hint of a change of ownership having taken place. The plaintiff advanced the following explanation. Having purchased the car from Gora he agreed to allow Gora to use it for a further week. When he went to collect it a week later, however, he noticed a rumble in the engine and Gora agreed to have it repaired at his own expense and took it to Dynamic. This, on the plaintiff's account, must have been in July, 1988 but the months went by and Gora kept saying he would take the car in but did not. If the car did not arrive at Dynamic until January 1987 when it had to be towed there this, said the plaintiff, was because Gora had continued to use it and must have damaged the engine further. The plaintiff also said that although Gora had never taken him to Dynamic himself in order to introduce him as the new owner he did telephone one of the directors, Josea Vilapoura, in the plaintiff's presence and informed him that the vehicle belonged to the plaintiff. This was put to Vilapoura who categorically denied that any such thing had happened.

The plaintiff's explanation regarding the boat was on somewhat similar lines. When it was sold to him it needed major repairs and Gora took it to Dynamic on his behalf. He, that is the plaintiff, was to pay for the repairs but for some unaccountable reason Gora told Dynamic to charge the judgment debtor. As for Gora trying to sell the boat this was being done on behalf of the plaintiff. Having sold the boat to the plaintiff for E18,000 Gora and the plaintiff entered into an arrangement whereby Gora would try to sell the boat on the plaintiff's behalf and he, Gora, would retain for himself anything over and above E25,000.

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The two transactions described by the plaintiff are, to my mind, in many respects totally bizarre. Having purchased a car for E10,000 for the purpose of resale he then allows the seller to use it for at least six months. In the final result the car is garaged with a repair bill of almost E1,800 which the plaintiff accepts he will have to pay himself because Gora, who appears to be the alter ego of the judgment debtor, has disappeared. Having purchased a boat for E18,000, a boat which is in need of repairs but no proper check having been made as to the extent of those repairs, an arrangement is made with the seller that he should try to find a further purchaser and share in the profits of a resale. One is bound to ask why the seller should sell in the first place if he thought he could obtain a price far in excess of the price agreed upon. Then there is the fact that outside the documents signed by Gora there is no other evidence of a sale having taken place. According to the plaintiff both sales were cash transactions and neither appears in the books of his business because he simply took cash out and would, he says, have replaced it once a further sale had taken place. This seems, at very least, unorthodox. The change of ownership form was never sent to the authorities. Again, this seems unorthodox. Then there is the question of the photocopied cheque referred to by Vilapoura. I accept Vilapoura's evidence concerning this and what is significant is that on the plaintiff's account there would have been no cheque as it was a cash transaction. I am led to the conclusion that at that stage no invoice existed. There is also, of course, the conflict between the plaintiff and Vilapoura as to the alleged telephone call by Gora. I prefer Gora's account.

In my judgment the transactions described by the plaintiff are not just bizarre but when all the foregoing factors are taken

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into account they are wholly suspect. I am not in the least persuaded that any genuine transaction took place and, putting the matter perhaps rather too kindly, I am not satisfied that the plaintiff has established

that either car or boat ever became his property. His claim was, therefore, dismissed.

N.R. HANNAH

CHIEF JUSTICE