

IN THE HIGH COURT OF SWAZILAND

FIRST NATIONAL BANK OF SOUTH AFRICA LTD

VS

PAUL ZONDIKHAYA SHABANGU

CIV. CASE NO. 1956/98

CORAM S.W. SAPIRE, CJ

FOR PLAINTIFF MR. HENWOOD

FOR DEFENDANT MR. MAMBA

JUDGMENT

(9/10/98)

Before Court is an application by the applicant the First National Bank of South Africa Limited in which the applicant seeks an order, that

a) Pending the final determination of the application the Respondent and or any other person acting through the Respondent be and is hereby ordered to hand over to the Sheriff or his lawful Deputy a Mercedes Benz E220 M motor vehicle with engine number 11196060028698, (and I will refer to this as "the vehicle".)

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b) The Sheriff is to be authorised to attach and remove the vehicle from the possession of the Respondent and the vehicle is to be placed in safekeeping.

c) That the order asked for operate as a temporary interdict pending the final determination of this application.

The application was made on notice and was originally launched on the 31st August 1998. The respondent was required in terms of the notice of motion to notify the applicant's attorney on the 18th September 1998 of their intention to defend and then within fourteen days in terms of the notice as it reflects the rule the respondent was to file its answering affidavits, if any, and were to appoint, as it is required, an address.

This application prima facie is only for a temporary attachment but the respondent has not answered the application at all as far as the merits are concerned or placed before the Court anything to contradict what he said in the founding affidavit. What there is before the Court is a notice of intention to oppose which was given on 14th September 1998 well within the time limit were given in the notice of motion. That meant that there was an obligation on the respondent to file an affidavit within fourteen days of giving the notice. That period ends sometime in October. On the 30th September the respondent caused a notice to be filed requiring Plaintiff in the above action to provide security for respondent's costs in the amount of E10 000.00. The reason stated for the application for security is that the applicant is a peregrinus of the above Honourable Court.

This fact is not denied nor is the obligation to give security contested. The applicant has however served the notice on the 7th October informing the respondent that it contests the amount of security demanded

by the respondent on the grounds that the same is excessive in the circumstances. Almost simultaneously with the filing of that notice a notice of set down of the application has been made for today and the relief set forth in the application is moved by the applicant's counsel.

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The question which arises today is whether in terms of Rule 47(1) the proceedings are stayed merely by the demand for security and whether this Court is debarred from granting any of the relief claimed in the notice of motion while the question of security remains undecided.

Section 47(1) gives the right to any party entitled and desiring to demand security for costs, as soon as practicable of the commencement of the proceedings, to deliver a notice setting forth the grounds upon which such security is claimed and the amount demanded. The rule in sub-rule (2) provides further that if the amount of security only is contested the Registrar shall determine the amount given.

This is the stage we have reached. The amount of security only, is contested. As yet the Registrar has not been called upon to determine the amount of Security to be given nor has he in fact determined such amount.

The rule then provides that if the party from whom security is demanded contests his liability to give security, or if he fails or refuses to give security in the amount demanded or the amount fixed by the Registrar within ten (10) days of demand, or the Registrar's decision, the other party may apply to Court on notice for an order that such Security be given and that the proceedings be stayed until such order is complied with.

That is the relief given to the person demanding security. It must be noticed that such an application to Court may only be made if the person upon whom the demand is made to furnish the security refuses to furnish security in the amount demanded or the amount fixed by the Registrar. Until the Registrar has fixed the amount therefore and the amount has not been paid, no application may be made in terms of that Rule. There is nothing in the Rule, which stays proceedings pending the decision of the Registrar on the amount of security to be furnished. The Rule goes on to provide that if security is not given within a reasonable time the court may dismiss any proceedings instituted or strike any pleadings filed by the party in default.

The remaining provisions of the Rule regarding the form of security are not relevant. On this reading of the Rule there is no basis for the respondent to come to Court today and say that the application in terms of the original notice of motion is

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incompetent or should not be acceded to and in view of the absence of any replying affidavit I intend to deal with the application on that basis.

The Notice of Motion is framed in a most confusing manner. The primary relief which the applicant seeks is a rule nisi calling upon the respondent to show cause why the car should not be attached, removed from the respondent's possession, and held by the Deputy Sheriff pending the outcome of proceedings for return of the vehicle. This rule however is to have immediate effect so that the ultimate relief is in effect granted before the proceedings are determined.

There is no prayer for permanent return or delivery of the motor car. Paragraph 2 prays that paragraph 1 of this order operates as a temporary interdict and order against the respondent pending the final determination of this application, "and the action aforesaid". What action is referred to be difficult to understand, No action is previously mentioned nor is any action described in the notice of motion.

There is however an application for further or alternative relief. I order that the application be postponed to a date to be fixed by the Registrar. Pending the determination this application the vehicle referred to in

paragraph 1.1.1 is to be attached by the Sheriff or his lawful Deputy and held in a place of safekeeping to preserve the vehicle.

When the application is heard it will be the basis that the applicant is seeking outright return of the motor car.

The costs of today's hearing will be paid by the Respondent.

S.W. SAPIRE

CHIEF JUSTICE