



SWAZILAND HIGH COURT

CITY JAP AUTOS IMPORT AND EXPORT
Plaintiff

Vs

Martin Akker and 2 others
Defendant

Civ. Trial No. 2596/2001

Coram

Sapire, CJ

For Plaintiff

Mr. S.C. Simelane

For Defendant

Mr. W. Mkhathswa

JUDGMENT *(08/10/2001)*

The application is for the return of a vehicle being a Toyota RAV4 1996 MODEL Registration No. SD 467 NG. Details of the description of the particular vehicle are set out in paragraph 2 of the Notice of Motion.

At Paragraph 3 is another prayer requiring an interdict preventing the respondent from executing writ issued under case no. 966/2001 in a matter between the 2nd Respondent and Japanese Auto Import and Export (Pty) Ltd.

When I raised a query as to the second form of relief sought, Mr. Simelane told me that there was an omission from the wording of this particular prayer. As it stands it does not make

sense. In any event I do not think that the relief sought in this prayer even if as explained by Mr. Simelane is either necessary or appropriate.

The case arises out of an alleged attachment by the 1st respondent as judgment creditor in an action where he sued a company Japanese Import and Export (Pty) Ltd. Obtained judgment and issued a writ which was put in the hands of the 1st respondent.

The writ requires execution in terms of rule 45(1) and is addressed to the Sheriff of Swaziland or his Deputy in the Manzini District. It requires the Sheriff to attach and take into execution removal goods of Japanese Auto Import and Export (Pty) Ltd, which is the defendant in the action.

The sheriff repaired and returned to the premises where the judgment debtor had been trading.. There he found a new company, the Applicant, in possession of the premises. The new company has a name similar to, and which suggests a connection with the name of the Applicant. Although similar to the name of the Applicant it is nevertheless different. The Applicant is not the judgment debtor.

According to his return, the Sheriff, on the 17th August, 2001 served the writ upon Mr. Ismail of City Jap Auto Import & Export (Pty) Limited who was in charge of the premises, ostensibly responsible, not less than 16 years of age, and in control of and at the place of business of the defendant at Lot No. 88, Matsapha Industrial Site, by handing abovementioned a copy thereof after exhibiting the original and explaining the nature and exigency of the said process under the provisions of Rule 4(2)(b) Act 20/1954. This return is fatally defective because it was obviously served on a company or a representative of a company other than the Defendant or judgment debtor.

The sheriff claims to have made an attachment of, two vehicles although it does not appear from the papers before me. One of them which was held by the Respondent under attachment, is a subject matter of this application. It appears that sometime thereafter the sheriff accompanied by the judgment creditor's attorney reinforced by members of the police removed the vehicle from the premises and intend apparently to sell it.

It is the return of this vehicle that the applicant seeks. The applicant has set out that it brought the business of the judgment debtor and had attached the deed of sale, which is dated the 23rd of March 2001 in terms of which the judgment debtor sold the business to the applicant. It appears that the motor vehicle in question was an asset of that business.

The applicant claims return of the vehicle. The writ requires service on the judgment debtor empowered the sheriff to attach the goods of the judgment debtor. This he did not do but

served on a representative of the applicant and attached and removed the vehicle apparently the property of the Applicant. Prima facie the applicant is entitled to the relief it seeks.

The respondents have opposed the granting of this relief relying on the provisions of section 34 of the Insolvency Act which reads as follows.

Voidable sale of business.

34. (1) If a trader has alienated any business belonging to him or the goodwill or any property belonging to such a business (except goods sold in the ordinary course of that business), and his estate is sequestrated within six months of such alienation, the alienation shall be void as against the trustee of his estate, unless, not less than ten days and not more than thirty days before such alienation, he published a notice of such intended alienation in two issues of the Gazette and in two issues of a newspaper circulating in the region in which the business was carried on.

(2) As soon as any such notice is published, every liquidated liability of the said trader in connection with the said business, which would become due at some future date, shall fall due forthwith, if the creditor concerned demands payment of such liability:

Provided that if such liability bears no interest the amount of such liability which would have been payable at such future date if such demand had not been made, shall be reduced at the rate of six percent per annum of that amount, over the period between the date when payment is made and that future date.

(3) If any person who has any claim against the said trader in connection with the said business has, before such alienation, for the purpose of enforcing his claim, instituted proceedings against the said trader in any court, and the person to whom the said business was alienated knew at the time of the alienation that those proceedings had been instituted, the alienation shall be void as against him for the purpose of such enforcement.

Respondent contended that as the sale of the business entered into by Japanese Auto Import & Export (Pty) Ltd and City Jap Autos Import and Export (Pty) Ltd had not been advertised as contemplated in Section 34 (1) it is void against creditors to the sale of business. Respondent's argument overlooks that the subsection is of application only if the trader is sequestrated within six months of the alienation. This is not so in the present case. It seems that Respondent's attorney was misled by relying on the authorities dealing with a similar provision of the South African Insolvency Act. The South African act although initially in the same terms as the local legislation has been materially amended. It is quite clear that this subsection does not have any effect until there has been a sequestration.

A further difficulty that arises in connection with that subsection is as to what is meant by "trader". There has been a long debate in the Republic of South Africa as to whether "trader" includes a company, this being so because the use of the word "sequestration" is inapposite in relation to a company. A company cannot be sequestrated. There is authority in South Africa that in this regard liquidation is tantamount to sequestration. As there has been no liquidation of the judgment debtor I do not have to consider this point.

Sub-section 3 which provides that if a creditor has instituted an action against a trader for recovery of debt and the trader subsequently alienates his assets or any of them to an alienee who was aware of the institution of the action, such alienation would then be void as against the creditor. The applicant is not within the ambit of this sub-section. The action, which was instituted by the judgment creditor, was subsequent to the apparent date of sale of the

business and there is nothing to show that the applicant knew of the institution of action, save to this extent, that the summons was apparently served not only on the company now a judgment debtor but also upon the applicant. Because the action was instituted subsequent to the sale the provisions of Section 34(2) have no application.

The attachment and removal of goods belonging to the applicant which was not a party to the action cannot be allowed to stand and the removal of the goods clearly constituted an unlawful taking. The position has to be restored to what it was.

I therefore order that the respondents return the vehicle namely the Toyota RAV4 1996 model SD 467 NG to the applicant forthwith and that the respondents pay the costs of this action jointly and severally, one paying the other to be absolved.

SAPIRE, CJ