

THE HIGH COURT OF SWAZILAND

UNISON RISK MANAGEMENT ALLIANCE (PTY) LTD

Applicant

In Re:

THE ATTORNEY GENERAL

1st Applicant

THE COMMISSIONER OF POLICE

2nd Applicant

And

SENZO NXUMALO

1st Claimant

UNISON RISK MANAGEMENT ALLIANCE (PTY) LTD

2nd Claimant

Civil Case No. 2138/2003

Coram

S.B. MAPHALALA – J

For the Applicants

No Appearances

For the 1st Claimant

No Appearances

For the 2nd Claimant

MR. S. DLAMINI

JUDGMENT (22/10/2004)

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The history of this matter is well chronicled in the judgment of Masuku J delivered on the 4th June 2004, and in the judgement I delivered on the 26th August 2004. In the latter judgment the issue before Court concerned the power of the Court to condone the late filing of process by a party in an application. The 1st Claimant had made the said application. The Court however, dismissed the application for condonation on the basis that the averments made by 1st Claimant to show good cause fell far too short in meeting the requirements of the law as spelt out in Erasmus, Superior Court Practice, Juta, 1997at B1 -171

In the present inquiry the Court is called upon to examine whether the 2nd Claimant has shown good cause for the court to condone the late filing of its Particulars of Claim. In the event the Court finds that it has proved good cause then to consider the ownership of the motor vehicle that is the subject matter herein.

In casu it appears to me that the averments made by the 2nd Claimant in paragraphs 6 to 12 in the affidavit of Sabela Dlamini show good cause for the court to exercise its discretion in 2nd Claimant's favour. Therefore condonation is granted as prayed for by the 2nd Claimant.

The 1st Claimant has failed to file its Particulars of Claim not only in accordance with the Interpleader notice filed by the Attorney General on the 10th March 2004, but also as per the Order of the Court dated the 30th April 2004 in terms of which the 1st Claimant should have filed same by the 5th may 2004, The Court dismissed 1st Claimant's application for condonation in the unreported judgment of the 26th August 2004. Accordingly, the 1st Claimant is barred from making any claim on the subject matter of the dispute herein in accordance with Rule 58 (5) of the Rules of this Court.

The next question for consideration therefore, is the substantive relief on ownership of the motor

vehicle. In my opinion, having considered the 2nd Claimant's affidavit, the Particulars of Claim reflect an unanswerable claim of ownership on 2nd Claimant's behalf. The motor vehicle was positively identified at the Lobamba Police Station by the 2nd Claimant's insured driver, Alan Rees. Annexure K2 and paragraph 3.3 of Alan Rees's affidavit at page 32 of the Book of Pleadings attest to this fact. Further,

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during his inspection of the motor vehicle, Alan Rees also found in the cubbyhole of the motor vehicle Annexure K3 which he had written in his own handwriting and left in the motor vehicle before it was stolen.

A further indicator pointing towards the 2nd Claimant is that the engine number is still the motor vehicle's original number. In this regard the manufacturer's affidavit support this conclusion. So is the deregistration certificate and the affidavit of Gerhardus Wilhelmus De Jager.

It is clear therefore from what I have said above that the 2nd Claimant is entitled to the relief sought in the application dated 23rd June 2004.

When the matter came for arguments Mr. Dlamini for the 2nd Claimant contended that the costs in this matter ought to be levied at attorney and own client scale. It was submitted that the 1st Claimant was stubborn and vexatious throughout the proceedings which he has managed to drag for over a year and that he has abused the court process and that his conduct was highly reprehensible. In this regard the court was referred to the South African cases of Nel vs Waterberg Landbouwers Kooperatieve Vereeniging 1946 A.D. 597; In Re: Alluvial Creek Ltd 1929 C.P.D. 532; Levirtsohns Meat Products (EDMS) BKK vs Addisionele Landdros, Keimoes En 'n Ander 1981 (2) S.A. 562 (NC) at 570 A.

I agree with the submissions made by Mr. Dlamini in this regard that 1st Claimant's right to possess the motor vehicle has always been seriously tainted due regard being had to the evidence presented before the court in the 2nd Claimant's Particulars of Claim. This raises the presumption of theft on the 1st Claimant's part in accordance with Section 4 of the Theft of Motor Vehicles Act No. 16 of 1991. From the facts of this case it can easily be deduced that the 1st Claimant's behaviour amounted to stubbornness bordering on vexatiousness. Therefore an order for costs in the scale of attorney-and-client will not be out of place in the present case.

In the result, the following order is accordingly recorded;

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1. The 2nd Claimant is granted an order in terms of the application dated 23rd June 2004;
2. The order in terms of which the 2nd Claimant provided security for 1st Claimant's costs in the sum of E13, 500-00 is discharged forthwith; and
3. The 1st Claimant is to pay costs at attorney-and-client scale.

S.B. MAPHALALA

JUDGE