

THE HIGH COURT OF SWAZILAND

PETROS S. DLAMINI

Plaintiff

And

JOSEPH KWARTENG

Defendant

Civil Case No. 2637/2005

Coram: S.B. MAPHALALA - J

For the Plaintiff: MR. S.C. SIMELANE

For the Defendant: MR. O. NDZIMA

JUDGMENT

(4<sup>th</sup> November 2005)

[1] Before court is an opposed application for summary judgment where Plaintiff has issued summons based on a claim of breach of an implied warranty against eviction in respect of a sale of a motor vehicle between the parties.

[2] The Defendant opposes the granting of the summary judgment contending that he has a bona fide defence to the action in so far as the motor vehicle was sold as is, and further that he had purchased the motor vehicle from a third party and that the Plaintiff had already sold the vehicle when it was attached by a court order.

[3] According to the authors Herbstein and Von Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4<sup>th</sup> Edition, at page 434 the procedure provided by the rules [for summary judgment] has always been regarded as one with a limited objective - to enable a Plaintiff with a clear case to obtain swift enforcement of his claim against a Defendant who has no real defence to that claim. The courts have in innumerable decisions stressed the fact that the remedy provided by this rule is an extraordinary one which is "very stringent" in that it closes the door, to the Defendant, and which will thus be accorded only to a Plaintiff who has, in effect, an unanswerable case. Some of the decisions come close to limiting a Plaintiffs resort to this remedy to cases in which the Defendant's conduct in giving notice of intention to defend is equivalent to an abuse of the process of the court (see for example, *Edwards vs Menezes* 1973 (1) S.A. 299 (NC)).

[4] It remains to be seen in casu whether the Plaintiff has a "clear case" which is "unanswerable" as required by legal authorities. On my readings of all the papers filed of record I do not think the Plaintiff on the facts has such "an unanswerable case" to obtain a summary judgement. I say so for a number of reasons. Firstly, there is a lot of controversy on the circumstances under which the court order was issued and the identity of the alleged true owner of the motor vehicle. Under what conditions does the true owners alleges that he can vindicate anyone in vacuo possessio of the motor vehicle, in as much as at the time of the sale between the parties, the Defendant was the sole owner on the vehicle in question. Secondly, it is contested by the Defendant when he alleges that the Plaintiff was not actually evicted from possession because the merx had already been sold to a third party. The Plaintiff was actually the owner of the motor vehicle in question as all documentation was in his name and eviction was impossible. Thirdly, there are other issues which a triable, namely the purchase price of the motor

vehicle and the amount paid by the Plaintiff to the Defendant.

[5] In the result, for the afore-going reasons I have come to the considered conclusion that Plaintiff has not satisfied all the requirements necessary for the court to grant the relief prayed for. The application is dismissed with costs and the matter to proceed to trial in the normal way.

S.B. MAPHALALA

JUDGE