



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil case No: 156/2014

In the matter between:

DENNIS FASANYA

APPLICANT

VS

HIRO

FIRST RESPONDENT

OLWAR KATHLAND

SECOND RESPONDENT

LARRY

THIRD RESPONDENT

JOEL

FOURTH RESPONDENT

ELVIS

FIFTH RESPONDENT

MAX

SIXTH RESPONDENT

KHETSIWE ZONDI

SEVENTH RESPONDENT

Neutral citation: *Dennis Fasanya vs Hiro and Six Others (156/2014) [2014]*

SZHC 429 (18 December 2014)

Coram:

M.C.B. MAPHALALA, J

Summary

Civil Procedure – spoliation application for the release of property seized without a Court Order from a tenant – principles governing spoliation proceedings discussed – held that the applicant was entitled to the release of his property – application granted.

JUDGMENT

18 DECEMBER 2014

[1] The applicant seeks an order that the respondents release to him the motor vehicles listed in annexure “A”; he further seeks an order directing and authorizing the deputy sheriff for the district of Manzini to attach, seize and deliver to him the motor vehicles listed in Annexure “A”. The applicant further seeks an order for costs.

[2] The first respondent is the owner of property described as Lot No. 585, Police College road in Matsapha. The applicant alleges that on the 6th May, 2013 at Matsapha, he concluded an oral agreement of Lease with the seventh respondent who was acting on behalf of the first respondent. The applicant further alleges that it was agreed between the parties that he would pay a monthly rental of E7 500.00 (seven thousand five hundred emalangeneni).

[3] The applicant contends that it was agreed between the parties that the initial rentals would be deducted from the costs of renovating the property as it was in need of extensive renovations. The applicant contends that he took occupation of the property and did the renovations from the 27th May, 2012 until the end of June 2013 at a total cost of E66 880.00 (sixty six thousand eight hundred and eighty emalangeneni).

[4] The applicant alleges that he met the first respondent in June 2012 and showed him the costs of the renovations, and, that the first respondent had accepted such costs. However, the first respondent is alleged to have told him to pay the first month's rental, and, that the subsequent monthly rentals, would be deducted from the total costs of the renovations. The applicant contends that he duly paid the first month's rental and proceeded to conduct his business on the property.

[5] The applicant further contends that on the 20th August, 2013, he was locked out of the premises by the seventh respondent allegedly due to arrear rentals. He contends that he attempted to consult with the first respondent with regard to the lock-out, and that the first respondent was avoiding him. He alleges that there are several items which remain within the property including motor vehicles, car parts and spares.

[6] The applicant further contends that the second to the sixth respondents were employed by him as mechanics; and, that they were now acting in support of the first and seventh respondents in dispossessing him of his property. He also contends that when he approached the respondents with a view to take his property, the respondents violently threatened him with iron rods.

[7] The motor vehicles listed in Annexure "A" are the following:

- (a) Mitsubishi, RVR 1992 S. Wagon, engine number 49631W7080, Chassis number N23W5412302.
- (b) 1999 Mercedes Benz A160, Engine No. A1665003790 and Chassis No. WDB1680332123270988.
- (c) Mercedes Benz 230E Sedan, Engine No. 10298062120625 and Chassis No. ADB1232236A190575.
- (d) Mercedes Benz 260E Sedan, Engine No. 10298062120625 and Chassis No. ADB1232236A190575.
- (e) Silver Grey Nissan Premier Sedan. The registration documents are allegedly inside the motor vehicle locked inside the premises.
- (f) Peugeot 406i. The registration documents are inside the motor vehicle locked inside the premises.
- (g) Yellow Ford whose registration documents are allegedly inside the motor vehicle locked inside the premises.

[8] Fuku Investments (Pty) Ltd, the estate agent managing the leased property is opposing the application, and, its director has accordingly filed an opposing affidavit. She denies that the seventh respondent is managing the leased property and contends that it is the company that was appointed by the first respondent on the 1st February 2012 to manage the property. To that extent the company contends that it is legally authorised to oppose the application on behalf of the first respondent.

(9) The estate agent further denies the involvement of the seventh respondent in the conclusion of the lease agreement; and, it contends that it drew up a written agreement between the applicant and Fuku Investments (Pty) Ltd at an agreed monthly rental of E10 000.00 (ten thousand emalangeni). It is their contention that the applicant was given the Lease Agreement for his signature and that the applicant did not return the lease agreement. A copy of the written agreement is annexed to the opposing affidavit.

[10] The estate agent contends that it was agreed between the parties that the applicant would utilise the requisite deposit and rent for May 2013 to effect renovations on the premises. It concedes that the applicant made some renovations

on the premises but denies that the costs of renovations amounted to E66 000.00 (sixty six thousand emalangeni); it suggests that the renovations could not have exceeded E10 000.00 (ten thousand emalangeni).

[11] The estate agent further concedes locking out the applicant from the premises, and that it instructed its security personnel to stop him from taking his property. It further concedes that the applicant was not allowed to take his property from the premises until he settled E69 658.85 (sixty nine thousand six hundred and fifty eight emalangeni eighty five cents) being arrear rental of E23 500.00 (twenty three thousand five hundred emalangeni), motor vehicle spare parts of E35 560.00 (thirty five thousand five hundred and sixty emalangeni), security services of E9 000.00 (nine thousand emalangeni) as well as a water bill of E1 598.85 (one thousand five hundred and ninety eight emalangeni eighty five cents).

[12] It is not in dispute that the second respondent was an employee of the applicant; and, he has filed an opposing affidavit stating that the motor vehicles should not be released. He contends that the applicant is indebted to him in respect of arrear salary in the sum of E42 200.00 (forty two thousand two hundred emalangeni).

[13] The seventh respondent has filed an opposing affidavit denying that she concluded the contract of lease with the applicant representing the first respondent. She further denies that she was hired by the first respondent to manage his properties. She contends that the said properties are managed by Fuku Investments (Pty) Ltd.

[14] In the case of *Swaziland Commercial Amadoda Road Transportation, Thokozile Masango and Eighty Others v Siteki Town Council Civil* case No. 254/2012 at para 17 and 18, I had occasion to deal with spoliation proceedings, and, I had this to say:

“[17] It is trite law that the essence of the “*mandament van spolie*” is that the person who has been deprived of possession must first be restored to his former position before the merits of the matter can be considered. The main purpose of this remedy is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to submit the matter to the jurisdiction of the courts. In order for peace to prevail in a community and to be maintained, every person who asserts a

claim to a particular thing should not resort to self-help in order to gain possession of the thing. The motion proceedings are ideal and expedient for this remedy since it is urgent in nature with a quest to restore the status *quo ante* before the equities and merits of the case are considered; any delay would defeat the unique and summary nature of the remedy.

[18] There are two essential requirements which the applicant must prove: Firstly, that he was in peaceful and undisturbed possession of the thing; and, secondly, that he was unlawfully deprived of such possession. It suffices for the applicant in this first requirement to show that he had factual control of the thing coupled with the intention to derive some benefit from the thing. Furthermore, he must prove an act of spoliation, that he had been deprived of his possession of the thing without a court order or against his consent.”

[15] It is apparent from the evidence that there was a contract of lease between the applicant and the first respondent. It is not in dispute that the estate agent, Fuku Investments (Pty) Ltd, locked out the applicant from the premises and further instructed personnel security to deny him entry into the premises. It is also not in dispute that the applicant was prevented from removing any of his property from the premises. It is common cause that the respondents did not have a court order to lock out the applicant from the premises; the estate agent exercised self-help to deprive the applicant of his property. It was open to the first respondent and/or the estate agent to obtain a court order to perfect the hypothec over the property. Similarly, it was open to the second, third, fourth, fifth and sixth respondents who were employed by the applicant to institute legal proceedings against the applicant for salaries owed.

[16] Accordingly, the following order is made:

(a) The first respondent is directed to release to the applicant all the motor vehicles listed in Annexure “A” to the founding affidavit, to wit;

(i) Mitsubishi, RVR 1992 S. Wagon, engine number 49631W7080 and Chassis number N23W5412302.

(ii) 1999 Mercedes Benz A160, Engine No. A1665003790 and Chassis No. WDB1680332123270988.

(iii) Mercedes Benz 230E Sedan, Engine No. 10298062120625, Chassis No. ADB1232236A190575.

(iv) Mercedes Benz 260E Sedan, Engine No. 10298062120625 and Chassis No. ADB1232236A190575.

(v) Silver grey Nissan Premier Sedan locked inside the premises with its Blue book inside the motor vehicle.

(vi) Silver grey Peugeot 406i locked inside the premises with its Blue book inside the motor vehicle.

(vii) Yellow Ford locked inside the premises with its Blue book inside the motor vehicle.

(b) The deputy sheriff of the Manzini District is hereby directed and authorized to attach, seize and deliver to the applicant the motor vehicles listed in order (a) above.

(c) No order as to costs.

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT

For Applicant : Attorney Leo Gama

For First Respondent : Attorney L.M. Simelane