

**THE HIGH COURT OF SWAZILAND**

**UNISON RISK MANAGEMENT ALLIANCE (PTY) LTD**

**Applicant**

**In Re:**

**THE ATTORNEY GENERAL**

1<sup>st</sup> Applicant

**THE COMMISSIONER OF POLICE**

2<sup>nd</sup> Applicant

And

**SENZO NXUMALO I<sup>st</sup>**

Claimant

**UNISON RISK MANAGEMENT ALLIANCE (PTY) LTD**

2<sup>nd</sup> Claimant Civil Case No.

2138/2003

Coram

For the Applicants For  
the 1<sup>st</sup> Claimant

For the 2<sup>nd</sup> Claimant

S.B. MAPHALALA

No Appearances No  
Appearances MR. S.

DLAMINI

**JUDGMENT**

**(22/10/2004)**

The history of this matter is well chronicled in the judgment of Masuku J delivered on the 4<sup>th</sup> June 2004, and in the judgement I delivered on the 26<sup>th</sup> 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 1<sup>st</sup> Claimant had made the said application. The Court however, dismissed the application for condonation on the basis that the averments made by 1<sup>st</sup> 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, 1997 at BI -171*.

In the present inquiry the Court is called upon to examine whether the 2<sup>nd</sup> 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 2<sup>nd</sup> Claimant in paragraphs 6 to 12 in the affidavit of Sabela Dlamini show good cause for the court to exercise its discretion in 2<sup>nd</sup> Claimant's favour. Therefore condonation is granted as prayed for by the 2<sup>nd</sup> Claimant.

The 1<sup>st</sup> Claimant has failed to file its Particulars of Claim not only in accordance with the Interpleader notice filed by the Attorney General on the 10<sup>th</sup> March 2004, but also as *per* the Order of the Court dated the 30<sup>th</sup> April 2004 in terms of which the 1<sup>st</sup> Claimant should have filed same by the 5<sup>th</sup> May 2004. The Court dismissed 1<sup>st</sup> Claimant's application for condonation in the unreported judgment of the 26<sup>th</sup> August 2004. Accordingly, the 1<sup>st</sup> 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 2<sup>nd</sup> Claimant's affidavit, the Particulars of Claim reflect an unanswerable claim of ownership on 2<sup>nd</sup> Claimant's behalf. The motor vehicle was positively identified at the Lobamba Police Station by the 2<sup>nd</sup> 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,

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 2<sup>nd</sup> 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 2<sup>nd</sup> Claimant is entitled to the relief sought in the application dated 23<sup>rd</sup> June 2004.

When the matter came for arguments **Mr. Dlamini** for the 2<sup>nd</sup> Claimant contended that the costs in this matter ought to be levied at attorney and own client scale. It was submitted that the 1<sup>st</sup> 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 Ko-operative Vereeniging 1946 A.D. 597; In Re: Alluvial Creek Ltd 1929 C.P.D. 532; Levinsohns 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 1<sup>st</sup> 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 2<sup>nd</sup> Claimant's Particulars of Claim. This raises the presumption of theft on the 1<sup>st</sup> 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 1<sup>st</sup> 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:

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



S.B. MAPHALALA  
JUDGE