THE HIGH COURT OF SWAZILAND

GOOLAM HOOSEN DESAI

Applicant

And

KENNETH DLAMINI

Respondent

For the Applicant For the Respondent

(07/05/2004)

The application before court has a chequered history having been brought under a certificate of urgency on the 4th August 1999, and final arguments heard in December 2003, five years after the initial set down. The main reason for this delay is that at some point in its history it was referred to oral evidence there having arisen a dispute

The application is for cancellation of an agreement of sale entered into by the parties on the 15th July 1999; a return of the purchase price in the sum of ET45, 00O-00; and costs of suit.

The application is opposed and the parties have filed the requisite affidavits.

The Applicant is an adult businessman carrying on a passenger transport business at 4 West Road, Danhauser, Republic of South Africa.

The Respondent is an adult businessman of C/O Mahlalela & Associates, 1st Floor Enterprise Building, Ngwane Street, Manzini, Swaziland.

The substantial facts of matter are that on the 15th July 1999, the Applicant entered into an agreement entitled "Deed of Sale" with the Respondent, (per annexure "GHD1"). The material terms of the agreement were ***inter alia*** as follows:

> "4.1 The seller sold the purchaser a 1992 Mercedes Benz motor vehicle bearing registration no. SD 857 VM,
>
> 4.2 The purchase price is the sum of E145, 000-00 payable on or before the 15th July 1999 at the offices of Mahlalela & Associates;
>
> 4.3 Transfer of the ownership shall be effected to the purchaser on payment of the full purchase price".

According to the Applicant, in terms of the agreement he paid the purchase price of E145, 000-00 to the offices of Mahlalela & Associates on the 15th July 1999. He annexes a cash receipt issued by Mahlalela & Associates (per annexure "GHD2").

The Applicant alleges that the Respondent has breached the agreement by failing to transfer ownership of the vehicle to the Applicant. Consequently, he cancels the agreement and demands the return to him of the purchase price of El 45, 000-00. The Respondent has failed/neglected or refused to return to the Applicant the purchase price or any sum whatsoever.

On the other hand the Respondent does not deny the agreement and that he was paid the sum of E145, 000-00* as a purchase price for the bus but advances a defence in paragraph 6 of his answering affidavit as follows:

"6.1 I say that I delivered a bus to the Applicant and I signed the change of ownership form. I annex hereto a copy of the signed change of ownership form;

4.4 The Applicant refused to take the change of ownership form stating that he would take all the necessary documents later when he was ready to clear the bus with Custom Department.

4.5 Since the bus was not running, the Applicant hired a breakdown and towed it away from the premises".

The Applicant in turn filed a replying affidavit in answer to the above averments in paragraphs 6, 6.1, 6.2, 6.3, 6.4, 6.5, 6.6, 6.7, 6.8.1, 6.8.2, 6.8.3, 6.8.4, 6.8.5, 6.8.6, 6.8.7, 6.9, 6.10 of the said affidavit.

As there was a dispute of fact on the versions of the parties the court ordered that ***viva voce*** evidence be led.

In proving his case, the Applicant called four witnesses namely, Goolam H. Desai (the Applicant), Mfana Dlamini(Applicant's agent in the sale), Jabulani Masuku (the third party) and attorney T.L. Dlamini.

The evidence of the said people revealed that although the Respondent had received the sum of E145, 000-00 as the purchase price, delivery had not been effected on the same day but had to be effected the following day by the Respondent who was to sign the change of ownership from that day. It was never disclosed by Respondent to either Goolam Desai or Mfana Dlamini that the bus in question did not belong to him or even that there was a dispute over its ownership.

The evidence presented showed that the following facts were common cause:

1. The parties entered into an agreement of sale on the 15th August 1999;

4.6 **Pursuant to agreement Applicant paid Respondent the sum of E145, 000-00:**

4.7 **The bus, the merx of the sale agreement ended up in the possession of a third party:**

4.8 **The bus is registered in the name of the Respondent;**

4.9 **Sometime in 1999 Mr. Masuku, unlawfully dispossessed the Respondent of the said bus and this court granted an order in favour of the Respondent that the bus be returned to him;**

4.10 **The bus was eventually returned to the Respondent by the Deputy Sheriff after threats of further action against Mr. Masuku and without its gearbox;**

4.11 **Mr. Masuku moved an application before the Chief Justice about July 1999 claiming ownership of the bus. The Chief Justice ordered that the Respondent refrain from alienating the bus pending institution of action within fourteen days in order to determine ownership of the said bus;**

4.12 **That the Respondent had not disclosed to either Mfana Dlaihini or the Applicant that there was actually a dispute over the ownership of the bus between Applicant and one Jabulani Masuku.**

4.13 **That the bus was removed from Kenneth Dlamini's place by means of a breakdown from a garage in Manzini called Auto Mozambicano where upon arrival, it was taken forcefully by one Jabulani Masuku, with whom Kenneth Dlamini had had a dispute over the ownership of same.**

4.14 **That the Applicant had arrived at the scene where the bus was being taken by Jabulane Masuku and had done nothing to assist the purchaser. Whilst confirming this aspect of the matter, Applicant says that he had not helped because there was no duty/obligation on him to do so as he had already delivered the bus.**

4.15 **That the bus did not reach its intended destination and that same had been taken by Jabulane Masuku.**

According to Jabulane Masuku the bus belongs to him. He had purchased same from Dorbly Vehicle Trading and Finance Company (Pty) Limited, ***~a*** South African company by means of an instalment sale agreement and for a sum of E395, 938-40 and the said sum was payable with interest over a period of five (5) years. This agreement was concluded in December 1991. In order to provide this bus with a route, he had in 1993 June concluded an agreement of sale of the road transportation permit with Kenneth Dlamini for a sum of E35, 000-00 which was paid in full by means of three (3) cheques. This transaction is not denied by the Respondent. Pursuant to the sale of the permit he had used the permit for plying the route with the said bus which was at all times kept at his place for which he used to receive and utilize the proceetls for his own account. Masuku further stated that, he had always kept the Blue Book (registration document) of the bus under his name which he was only forced to change into Kenneth Dlamini's name sometime in 1996 (however, according to Kenneth Dlamini this was done in 1997). The bus had to be changed into Dlamini's name because at the time the Road Transportation Board had refused to renew the permit resulting in Kenneth Dlamini, in whose name the permit had always" been,' having to approach court for art order compelling the Road Transportation Board to renew the said permit. After this exercise the Blue Book was returned to Masuku who once again had to keep the bus. He continued plying the said route.

Sometime in 1997, Jabulani Masuku had hypothecated the same bus to Dorbyle as a security for another bus as reflected in exhibit "G". Masuku had later obtained another route which he felt would return him better profit and he sought to remove the bus from the Malkerns, Mahlanya and Manzini route to that route. The bus had been taken by his employee at the instance of Respondent; to the police station, Manzini for a clearance. At the police station the Respondent had then taken the bus and alleged that Masuku was owing him. Masuku had collected the bus from Kenneth's driver who had for the first time used it to ply the same Malkerns, Mahlanya and Manzini route. This took a considerably short period of about a day or two. Then Masuku had then collected the bus from Kenneth's driver at Nazarenc bus stop. Kenneth Dlamini then reacted to this by filing an application for spoliation under Case No. 630/99. Pursuant to this application Masuku was ordered to return the bus to the Applicant, which he did after having removed its gearbox. Kenneth Dlamini

had through his lawyers filed an application to commit Masuku to prison for contempt of court when the latter had refused to hand over the bus.

Then at this point Masuku moved an urgent application for the return of the bus to him on the basis that he was an owner. The matter came before the then Chief Justice who had under Case No. 1349/99 ordered that the bus in question be held by the Respondent pending the institution and determination of an action as to who was the owner of the bus was. The said action was to be made within 14days of that order.

According to attorney Mr. T.L. Dlamini (DW4), the said application was served personally on the Respondent, who had appointed attorney Mr. Mandla Mahlalela to act for him in this matter. Kenneth Dlamini and Mandla Mahlalela were in court when the Chief Justice made the order in question. Kenneth Dlamini was fully aware of the court order.

According to the Applicant the action had not commenced against Mr. Dlamini because there had ensued settlement negotiations between the parties to the extent that the parties had actually met where it transpired that the Respondent's main complaint was an undisclosed debt, which he alleged Masuku owed him.

The Respondent gave evidence wherein he told the court that was sold the bus in question by Jabulani Masuku sometime in 1997 for a sum of E250, 000-00, which money he had obtained from the sale of his Two Sticks property to Tavern Hotel. He told the court that he paid Masuku this amount of money in cash in the presence of his late Accountant one Aaron Hlatshwayo. The alleged agreement was verbal.

He deposed that he used the bus to ply the Malkerns, Mahlanya and Manzini route. At the same time he had sold the permit for the route in question to Masuku for E35, 000-00. Masuku had paid him by means of cheques ***viz*** exhibits "A", "B" and "C". He deposed that he had always operated the same bus he had purchased from Masuku on the same route he had sold the latter for about four years before demanding that same be registered in his own name, which he said was in 1997. He testified that from nowhere, Masuku had deprived him of his bus at the Nazarene bus stop removing the bus from his driver one Sipho Dlamini.

He~testified furdier that he was not aware of Case No. 1349/99 and the subsequent order thereof. He deposed that he had delivered the bus to Applicant by giving the bus to Mfana Dlamini, the Applicant's agent. He had there and then signed the change of ownership form and thus giving the bus to the Applicant. He stated that he had nothing to do with the taking of the bus by Masuku. As far as he was concerned he had delivered the bus and was no longer bothered about the aftermath.

In cross-examination by *Mr. Hlophe* for the Applicant the Respondent did not deny firstly, that the bus in question was purchased by Masuku in December 1991 from Dorbyle Vehicle Trading and Finance by means of an instalment sale agreement which was for five years; secondly, that he had not helped the Applicant in anyway to try and ensure that he obtains possession of the bus when the bus was taken by Mr. Masuku notwithstanding that he was there; and thirdly, that he had not disclosed to the Applicant before selling him the bus that his title to it was being disputed or contested for by Jabulani Masuku.

In the present case there are two issues for determination, namely; whether Respondent had title to pass ownership of the bus to the Applicant; and secondly, whether the bus was delivered to the Applicant.

Counsel made submissions before me and filed Heads of Argument. The position taken by the Applicant is that from the evidence adduced in court it has been shown that ownership of the bus at all times vested in Jabulani Masuku and not the Applicant. Therefore, in terms of the law one to successfully transfer a real right in an item pursuant to a sale, the seller must have such right. Nobody can give something he does not have *(nemo dat qui non habet).* That this rule is based on the old Roman law maxim - *nemo plus iuris transferre potest quano ipse habet,* which means that nobody can transfer a greater right than he himself has. For this principle the court was referred to the textbook by ***Silberberg and Schoeman, "The Law of Property" (2nd ED)*** at page ***72 - 73*** and the case of ***Glatthar vs Hassan 1912 T.P.D 322.***

It is argued for the Applicant that on the facts the Respondent was not the owner of the bus and as such he could not pass ownership. Any attempt to transfer ownership

in the bus by the Applicant was therefore not accompanied by the necessary intention, which entitles the purchaser to cancellation of the agreement and the return to him of the purchase price. Mere physical delivery of the thing is not sufficient to transfer ownership as this should be accompanied by the necessary intention on the part of the seller, (see ***Silberberg and Schoeman*** *(supra)* at page ***73).*** In *casu* the attempt by the Applicant to sell a bus that did not belong to him was clearly a fraudulent transaction which was dishonest.

It was further argued for the Applicant that assuming that Respondent had delivered the vehicle to Applicant, such delivery was not sufficient to pass ownership on two grounds; firstly, Respondent failed to give Applicant *vacua possessio* a free and undisturbed possession, not in contest when delivered and secondly, Respondent failed to warrant Applicant against eviction. For the former proposition the Applicant cited the leading case of ***Theron andDu Plessis vs Schoembe (1897) 14 S.C. 192*** and for the latter argument the court was referred to the case of ***Kleynhans Bros vs Wessels' Trustee 1927 A.D. 271.*** A further argument advanced for the Applicant is that the Respondent had also not done anything to assist the Applicant when possession of the bus was taken by the other claimant, notwithstanding that he was obliged in law to do so (see ***Gibson, South African Merchantile & CompanyLaw*** at pages ***138 -139).***

Mr. Magagula for the Respondent advanced *au contraire* arguments. The argument is two fold. Firstly, that on the papers filed of record, the Applicant is not entitled to the relief sought. The Applicant has not alleged in his papers that Respondent's titles was defective at the date of sale and/or that such defect was the result of Respondent's fault. Secondly, the seller does not engage to transfer ownership to the buyer by delivery and cannot be compelled to do so. He undertakes only to give a lesser right in the article, namely possession *(vacuo possessio).* In this regard the court was referred to ***Gibson,*** *(supra)* page 1,2 and 3, ***Kleynhanis Brothers,*** *(supra)* page ***282, Lammer vs Giovannoni 1955 (3) S.A. 385*** and ***Anders Precedents of Pleadings (2nd ED)*** page ***184.***

The above therefore are the arguments for and against the present application. As I have mentioned earlier on in this judgment there are two questions for determination

viz whether Respondent had title to pass ownership of the bus; and whether the bus was delivered to Applicant. In the present case on the totality of the evidence before me it is my considered view that the Respondent attempted to sell a bus that did not belong to him. clearly this was a fraudulently transaction which was dishonest and on the principle enunciated in ***Amler's Precedents of Pleading*** *(supra)* the Applicant is entitled to cancellation and to restitution, forthwith.

The inconsistencies, and contradictions by the Respondent have led me to conclusion that the ownership of the bus has throughout remained with Masuku. Notwithstanding his awareness that the bus was still subject to a five year (instalment sale) it was sold by Dlamini to Masuku for a mere E250, 000-00 a year later notwithstanding same having been purchased for E395,000-00 plus interest a year earlier. I find in this regard that it would be ridiculous to believe that Mr. Masuku could sell the bus which he was still paying for at a loss to himself.

It is further difficult to comprehend that Masuku after having sold the bus to the Respondent would still buy the permit for the route that was being plied by the bus he had allegedly sold to the Respondent. Clearly the purchase of the permit at this stage would be of no use to Masuku if he sold the bus. That Masuku would have purchased a permit without having any bus to ply that route and then allow Respondent to ply the same route with the very bus Masuku had purchased the permit for, simply boggles the mind and is devoid of any business sense.

Further evidence before me showed that on the 17th October 1997 Masuku still hypothecated the same bus as a surety for another transaction he had with Dorbyle Vehicle Trading and Finance yet at that stage he had already sold the bus to the Respondent.

From these facts it is hard not to conclude that Respondent was never the owner of the bus.

It appears to me that although the action directed by the High Court had not been made, that in itself had not given the Respondent the right to sell the bus given the manner in which the order was couched ***viz,*** that Respondent was to keep the bus in

question in his possession pending the institution and determination of an action, on the'ownership of the bus.' The court had not intended that if for whatever reason the action had not been instituted the Respondent had ownership of the bus. I disagree with ***Mr. Magagula*** for the Respondent that the reasons given for failure to launch the court action are spurious. In this regard I prefer the evidence of attorney T.L.Dlamini on this aspect of the matter. It appears from the facts that there were negotiations between the parties. The Respondent was not a reliable witness in this regard in that he contradicted himself on a number of material respects under cross-examination and I find that he was not a credible witness.

Even assuming that Respondent had delivered the vehicle concerned, in my view such delivery was not sufficient to pass ownership for a number of reasons. Firstly, Respondent failed to give Applicant ***vacua possessio*** as enunciated in the case Of ***Theron and Du Plessis vs Schoembe (1897) 14 S.C. 192*** where the learned Judge in that case stated the following:

> **"And if the vendor (seller) knew that he was not the owner and made a sale to a buyer ignorant or that fact, so as wilfully to expose the latter to the danger of eviction, (taking away of the article) the vendor's conduct was deemed fraudulent, the equitable suit, *ex empto,* without waiting for an eviction".**

Secondly, Respondent failed to warrant Applicant against eviction. It is common cause that at the time Respondent purported to deliver the bus to Applicant, he had not disclosed that his title was being contested, and this entitles Applicant to cancellation and restitution or payment of the purchase price, ***(per Gibson (supra)*** at ***138 - 139).***

Respondent had also not done anything to assist the Applicant when possession of the bus was taken by the other claimant, notwithstanding that he was obliged in law to do so. In this regard what is stated by the learned author ***Gibson (op cit)*** at page ***140*** is apposite:

> "The implied warranty against eviction is no more than a term implied by law in a contract of sale by virtue of which the seller undertakes that the buyer will not be disturbed, whether by the seller himself or by a third party, in his *vacua possessio*, as a result of any defect in his title".

The learned author goes on to cite the case of ***hammers & Lemmers vs Giovannoni 1955 (3) S.A. (AD)*** at 597 for this proposition where the following was said:

> "The seller ...is not an insurer. His implied warranty is not that the purchaser will not be vexed by the unlawful acts of others. All he warrants is that the purchaser will not be lawfully evicted because of defective title".

Further on, at the foot of page 140 of the same text the learned author continues as follows:

> "Should there be a threat to the buyer's possession it is the duty of the seller to spring to his defence, even before actual eviction by judicial process takes place ..."

I am in respectful agreement with the principles enunciated above and hold the view that in the circumstances, the Applicant is entitled to the remedy he seeks in so far as he has shown that the bus belonged to Mr. Masuku and not to the Respondent at the time of the purported sale. Furthermore, Respondent had fraudulently purported to sell the bus.

Butterworths Forms and Precedents: Commercial Transactions 2 "Purchase and Sale of Movable Property" at page ***608*** states the following:

> "There is an implied warranty against eviction in every sale agreement in that the seller is deemed to guarantee undisturbed possession to the purchaser. The guarantee involves an implied undertaking by the seller (i) that he will not disturb the purchaser's possession; (ii) that if the purchaser's possession is threatened by a third party, the seller will defend the purchaser against such threats; and (iii) that if the third party is successful in his attempts and the purchaser is evicted, the seller will make good to the purchaser such loss as he may have suffered. This will be the equivalent of the purchase price, legal costs incurred by the purchaser in resisting the claim, improvements he has made to the property and any other damages which the purchaser may have incurred by reason of the seller's breach of contract".

In the result, the Applicant is entitled to the cancellation of the agreement of sale and a refund of the purchase* price in terms of prayers 2.1, 2.2 and 2.3" of the notice of motion, and it is so ordered.

S.B. MAPHALALA

JUDGE