THE HIGH COURT OF SWAZILAND

SAMUEL ZAMBIA MAPHANGA

Applicant

And

SIKELELA DLAMINI

1st Respondent

SWAZILAND INDIGENOUS CONSTRUCTION

2nd Respondent

MPHUMELELO MOTOR TRANSPORT

3rd Respondent

Civil Case No. 2844/2005

Coram: S.B. MAPHALALA - J

For the Applicant: MR. S.C. SIMELANE

For the Respondents: MR. N. MABUZA

JUDGMENT

(24lh May 2006)

[1] On the 9' February, 2006 this court referred the matter to oral evidence on the point of ownership of the buses in this dispute where Applicant has moved an application under a Certificate of Urgency interdicting and restraining the Respondents from proceeding with the sale of two buses registered SD 702 OM and SD 834 VM.

[2] In this regard I heard the evidence of the Plaintiff who stated that on the 8th May 2004 he was in the company of Mandla Mkhumane (PW2) when he purchased the two buses from a company named Grand Wheels (Pty) Ltd for a sum of E80, 000-00 which was

paid in two instalments of E10, 000-00 which was paid in cash on the 8th May 2004 and a Swaziland Building Society guaranteed cheque of E70, 000-00 paid on 11th May 2004. The buses were sold to him by the said company which was acting on behalf of the 3rd Respondent, and properly mandated to do so, in terms of a management contract between that company and the 3rd Respondent. In this regard he referred to a copy of the resolution taken by the shareholders of the 3rd Respondent on the 7th May 2004, marked "STM3", as proof of the mandate to sell given by the 3rd Respondent to Grand Wheels (Pty) Ltd. At the time of the sale, he was represented by Mandla Mkhumane who was his agent in concluding the sale of both buses. Upon purchase of the buses he was given the registration books of both vehicles, annexed as "SZM44" and "SZM5" respectively. He then took both buses from the premises of Sappi Usuthu where they were being kept to Matsapha Central Garage for repairs, as one of them was a non-runner. The buses are presently kept at Matsapha Central Garage. Thereafter followed a period where 1st Respondent attempted to execute the said buses on the strength of a court order.

[3] The second witness for the Applicant was PW2 Mandla Mkhumane, who in the main supported the evidence of the Plaintiff that he acted as an agent for the Applicant in the purchase of the two buses. The third witness for the Plaintiff was Aaron Ncongwane who is a shareholder of Mphumelelo Motor Transport (Pty) Ltd. His evidence did assist the court on what transpired between the Applicant and the said company but that the said company sold buses which could no longer operate at the time.

[4] The P[1] Respondent on the other hand led the

1 On the 9' February, 2006 this court referred the matter to oral evidence on the point of ownership of the

evidence of two witnesses one Philemon Sifundza and one Sikelela Dlamini. The former testified that he together with the Deputy Sheriff proceeded to Matsapha to effect the execution where they were told that the buses had been sold to another third party. The latter witness who is the Deputy Sheriff tried to effect the execution of the buses in Matsapha without any success.

[5] In arguments before me it was contended for the Applicant that the 1st Respondent has not challenged the Applicant's evidence. *Mr. Simelane* for the Applicant further relied on the provisions of the Theft of Motor Vehicle Act No. 16 of 1991 in particularly Section 7 (1) and 2 thereof. The proposition advanced in respect thereto is that "a document" in the said Act is not a described and therefore the documents which have been filed in the present case would constitute a "document". The court was further referred to Section 6 of the Hire Purchase Act to the same effect. It was contended that Applicant has proved that he purchased both buses in this case. The Applicant further relied on his Heads of Arguments filed before this court on the 21st October 2005.

[6] On the other hand *Mr. Mabuza* for the 1st Respondent filed Heads of Arguments raising a number of points including that of urgency to the effect that Applicant has not followed the requirement of Rule 6 (25) (b) in that nowhere in the Applicant's Founding affidavit is the court informed of the reasons why Applicant cannot obtain substantial redress at a hearing in due course. Secondly, on the ownership of the buses it is contended for the Is' Respondent that there was no genuine sale of the buses by 3rd Respondent to Applicant as alleged. Annexures "SZM1-3 are fabrications which are intended to halt and derail justice. The buses belong to and are registered in the name of 3rd Respondent and this is

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buses in this dispute where Applicant has moved an

supported by annexures SZM4 and 5. Even if there was purported to be a sale of the buses, same was done in *fraudem creditorum* as 2nd Respondent had long obtained judgment against 3rd Respondent and was a secured and preferred creditor long before the purported sale.

[7] Thirdly, it was contended for the 1st Respondent that Applicant has failed dismally to even allege some of the peremptory requirements as enunciated in the South African case of *Setlogelo vs Setlogelo 1914 A.D. 221.* On the fourth argument *Mr. Mabuza* challenged the oral evidence adduced on behalf of the Applicant. The fifth argument is to the effect that the Founding affidavit does not contain annexures of the alleged "management contract". This is cured, belatedly, in the replying affidavit. In this regard the court was referred to the High Court case of *Ben Zwane vs Deputy Prime Minister and another Case No. 624/2000* at page *11*.

[8] It is common cause that the Applicant *in casu* has applied for a final interdict as reflected in prayer 1 and 2 of his Notice of Motion. It is also common cause between the parties that the legal authority which governs this matter is that of *Setlogelo vs Setlogelo (supra)* where requirements for a final interdict were held to be (i) clear right, (ii) an act if interference, and (iii) no other remedy. On the facts of the present case it appears to me that Applicant has not proved the third (iii) requirement that he has no other remedy. It appears to me that on the facts of the present case the Applicant has a case against the 3rd Respondent who is the cause of all his problems in this case. It is trite law that the court will not, in general, grant an interdict when the Applicant can obtain adequate redress, in some other form of ordinary relief, (see *Peri-Urban Areas Health Board vs Sandhurst Gardens (Pty) Ltd 1965 (1) S.A. 683 (T) 684 G).* An Applicant for a permanent interdict must allege and establish on a balance of probability, that he has no

alternative legal remedy, (see *Prinsloo vs Luipaardsvelei Estates and Gold Mining Co. Ltd 1933 WLD 6* at *25 - 5).*

[9] Furthermore, it appears to me that *Mr. Mabuza* is correct in his submissions that even if there was a sale of the buses, same was done in *fraudem creditorum* as 2nd Respondent had long obtained judgment against 3rd Respondent and was a secured and preferred creditor long before the sale. I find that the authority in *Fenhalls vs Ebrahim (supra)* applies to the facts of this case.

[10] In the result, for the afore-going reasons the application must fail. Costs to be costs in the course.

S.B. MAPHALALA - J