

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 890/2008

DAVID FASHIPE

Applicant

And

SANDILE DLAMINI N. O.

1st Respondent

SWAZILAND PROPERTY MARKET (PTY) LTD

2nd Respondent

In re:

SWAZILAND PROPERTY MARKET

Applicant

And

PASTOR ALEX AKINYENI

Respondent

Coram: S.B. MAPHALALA – J

For the Applicant: MR. N. PILISO

For the Respondent: MR.S. MADZINANE

JUDGMENT

8th October 2008

[1] Before court is an urgent application for an order interdicting and/or restraining the 1st Respondent (Deputy Sheriff) from disposing by public auction a motor vehicle seized or attached by him from the Applicant pursuant to a writ of execution issued in a matter wherein the Applicant was not a party. Applicant further seeks an order declaring the attachment of the motor vehicle aforesaid by the 1st respondent unlawful.

[2] The said application appeared before Annandale J on the 18th July 2008, whereby a rule *nisi* by consent was granted which has been extended on a number of occasions until the 19th September 2008.

[3] The Founding affidavit of the Applicant is filed where he outlines the material facts in this dispute.

[4] Respondent has filed a Notice of Intention to Defend and has filed an Answering Affidavit of Manene Khombelwako who is the Managing Director of the 2nd Respondent, the Applicant in the main application.

[5] In the said affidavit three points *in limine* have been raised. The first point raised is that there is a serious and substantial dispute of fact in this matter relating to whether Mr. Alex Akinyemi is indebted to the Applicant for E20, 000-00 or not, the authenticity of the signature to the purported loan agreement relied on by Applicant and whether Alex gave the car to the Applicant. The Applicant David Fashipe has always been aware of the dispute of facts but elected to commence application proceedings.

[6] The second point raised is that the agreement entered into between Lomapam Investments and David Fashipe is invalid and unlawful in so far as the car dealer sought to sell a motor vehicle already sold to Alex Akinyemi to the Applicant without having first cancelled the agreement of sale between

Lomapam Investments and Alex Akinyemi nor refunding Alex the money already paid. Accordingly Applicant cannot rely on an unlawful and invalid agreement entered into between him and Lomapam Investments fraudulently.

[7] The third point *in limine* is that Applicant has failed to demonstrate that it has a clear right to the motor vehicle as the alleged agreement between it and Lomapam Investments is

invalid and unlawful and the purported agreement with Alex Akinyemi is denied as even the registration of the motor vehicle is incorrect.

[8] Reverting to the first point raised that there are disputes of fact the general rule which has been laid down repeatedly is that an Applicant must stand or fall by his Founding affidavit and the facts alleged in it. In arguments before me on this point the Applicant agreed that there are disputes of fact and moved the court to invoke the provision of Rule 6 (18) of the High Court Act No. 20 of 1954 and order oral evidence on specified issues.

[9] Having considered that Applicant agreed that *in casu* there are disputes of fact and in the exercise of my discretion as to the future course of the proceedings in terms of Rule 6 (18) I order oral evidence to be heard on the specified issues with a view of resolving any of the disputes of fact, (see *Durilop S.A. Ltd vs Metal and Allied Workers Union and Another 1985 (1) S.A. 177 (D)* at 189 (D)). In view of this conclusion on the disputes of fact I will not address the other points raised *in limine*.

[10] In the result, the matter to stand down for Rule 6 (18) to be activated on the disputes of fact. Costs to be costs on the merits

of the case.

**S.B. MAPHALALA
PRINCIPAL JUDGE**