IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL TRIAL 294/08

In the matter between:

WILLIAM BONHAM	**ANDREW**	**Applicant**

AND

MASTER HARDWARE (PTY) LTD T/A BUILD IT **1st Respondent**

BHEKI MAVUSO N.O. HELEN DU PONT	**2nd Respondent** **3rd Respondent**

In re:

MASTER HARDWARE (PTY) LTD t/a BUILD IT **Plaintiff**

And

RYAN MOYES NEVIL **Defendant**

Date of hearing: 28 January, 2009
Date of Order: 9 April, 2009
Date of judgment: 14 April, 2009

Mr. Attorney N. Thwala for the Applicant
Mr. S. Hlophe for the 1st Respondent
No appearance for 2nd and 3rd Respondents

JUDGMENT

MASUKU J.

[1] By way of an urgent application in the long form, the above-named Applicant approached this Court on notice seeking the following relief: -

(a) Dispensing with the normal rules relating to form, service and time limits as provided for in the rules of the above Honourable Court and dealing with the matter as an urgent one in terms of Rule 6 (25) of the Honourable Court.

(b) Condoning Applicant's non-compliance with the rules of the above Honourable Court.

(c) Declaring the Applicant to be the owner of the motor vehicle described to wit:

Make:Honda Civic Sedan (Blue) Registration Number: CSH 933 EC Engine Number: D15Z430164226 Chassis No. (vin): AHMED25313E126042

(d) Declaring the attachment execution and subsequent sale of the motor vehicle described above null and void *ab initio.*

(e) Directing the Respondents to return the motor vehicle to the Applicant by placing it in the custody of his attorneys within 48 hours after granting this order.

(f) Costs of suit at an attorney and own client scale.

[2] In support of the relief sought is a founding affidavit deposed to by the Applicant, together with certain supporting affidavits filed in relation to matters not immediately within the Applicant's knowledge. Needless to say, the 1st Respondent opposed the Application but in a risky fashion decided to raise points of law *in limine* and to seek leave to plead over on the merits.

[3] I refer to this as an entirely risky affair for the reason that raising points of law only and declining or neglecting to deal with the allegations on the merits may have calamitous consequences if the point (s) of law is or are dismissed. The Court is unlikely, in the absence of compelling reasons, to allow a respondent a further opportunity to respond to allegations it knew but for unexplained reasons declined the invitation to respond to and possibly join issue thereon and directly controvert.

[4] Furthermore, not only does this amount to a time-consuming exercise, it is also not cost-effective as the hearing, needless to say, has to be truncated to at least two hearing dates when a single hearing may have sufficed, particularly in situations where the point of law is dismissed. It should also be mentioned in this regard that the factual allegations contained in the Applicant's papers and upon which the relief is sought are, as I speak, totally uncontroverted and should ordinarily be allowed to stand as such.

[5] In regard to this issue, the learned authors Herbstein 85 Van Winsen, The Civil Practice of the Supreme Court of South Africa, Juta, 4th Ed, 1997 say the following at page 355 to 356:-

> "When the respondent raises preliminary issues but also has a defence on the merits he may not postpone the filing of an affidavit setting out his defence on the merits pending the court's

decision on the preliminary issues." See also the authorities therein cited.

Less still may a respondent relying on the forlorn hope that his preliminary point will succeed wait until the determination of that point by the Court and then seek to file a defence on the merits once he has been non-suited on the preliminary legal points. See also *Majobo Lawrence Mngomezulu v Commissioner of Correctional Services and Another* Case No. 1397/2005 (H.C.) per Mabuza J. at page 5 paragraph 7 and *Patrick Masinga v Afriloto (Pty) Ltd* (unreported) Civil Case No.3684/05 (H.C.) also per Mabuza J. All practitioners are being put on notice regarding this is

I now turn to the background giving rise to this *lis.* It is common cause that on 28 February, 2008, this Court granted a judgment by default in favour of the 1st Respondent against one Ryan Moyes Nevil. The judgment, sounding in money, was in the amount of E15,3006.54, interest thereon and costs.

[7] The execution process in order to satisfy the said judgment ensued and eventually culminated in the attachment of the

motor vehicle fully described in paragraph 1(c) of this judgment. It is common cause that the said vehicle was in the possession of Nevil, the judgment debtor. The attachment appears to have been effected on 22 April, 2008. There was, soon thereafter, a flurry of correspondence between the parties, Nevil, for his part stating that the vehicle in question did not belong to him and could not therefore be properly lain under attachment.

[8] The intervention of the Applicant's attorneys of record failed to persuade the 1st Respondent's attorneys and the Deputy Sheriff to release the vehicle from the attachment. As a result, the vehicle was eventually sold by public auction on 30 May, 2008 to the 3rd Respondent, who as appears from a return of service filed in respect of the present proceedings, is not averse to the relief sought being granted as long as the *pretium* was restored to her. Had her attitude been different in the sense that she opposed the relief sought, the edifice upon which this matter is grounded may have had

tremendous effect on the propriety of the order sought. I say no more of the issue in view of her non-opposition aforesaid.

[9] As indicated earlier, the 1st Respondent's position was to raise three points of law *viz,* the application failed to meet the requirements of Rule 6 (25) of the Rules of this Court, namely that the founding affidavit failed to explicitly aver the circumstances which render the matter urgent; the application failed to satisfy the requirements of a vindication as the applicant is not the owner of the vehicle in question and last, that in any event, the applicant failed to discharge the onus resting upon him to prove that he is the owner of the vehicle. The 1st Respondent, in consequence, applied for an Order dismissing the application with costs.

[10] The first point was correctly and wisely abandoned for the reason that the decision as to whether a matter is sufficiently urgent to justify a departure from the application of the normal rules, involves the exercise of a discretion by the Judge who determines the issue of urgency. Once he or

she has done so, then *cadit quaestio* on that issue. The parties may not, on the hearing of the matter on the merits advert to urgency even if they correctly hold the view that the Court erred in ruling that the matter was urgent. This is even so notwithstanding that the Judge dealing with the matter on the merits is otherwise inclined. Were the situation otherwise, it would amount to a Judge of co-ordinate jurisdiction reviewing a ruling of his Brother or Sister Judge, which is an untenable practice and proposition in our law.

Regarding the question of whether the Applicant has satisfied the elements of the *rei vindicatio,* it was the 1st Respondent's contention that the Applicant had dismally failed on that score. The 1st Respondent, placed heavy reliance on Silberberg and Schoeman's The Law of Property, by Kleyn 85 Boraine, 3rd Ed, Juta 85 Co. at page 274, where,

the learned authors state that in order for a party to succeed in the *rei vindicatio,* he or she must satisfy two requirements, namely (i) that the said parry is the owner of the property sought to be vindicated; and (ii) that it was in the possession of the defendant at the commencement of the action.

[12] The pith of the 1st Respondent's argument is that the Applicant is not the owner of the motor vehicle in question, as the vehicle was at the time of the application, subject to an instalment sale agreement. For that reason, it was contended on the 1st Respondent's behalf that the Applicant does not have the *locus standi in judicio* to move this application and that the only party who could be entitled to move an application for the *rei vindicatio* is the owner i.e. the bank through which the vehicle was procured.

[13] In a contrary argument, Mr. Thwala submitted that the Applicant, being the registered owner of the vehicle, was entitled to protect his possession of the property and need not rely, in order to do so, on the actions of the Bank. Mr. Thwala also referred the Court to a judgment of the Supreme Court in *Samuel Zambia Maphanga vs*

Sikelela Dlamini N.O. and Two (2) Others Civil Appeal Case NO. 26 /06 for the proposition that at common law, ownership of movable property passes when the owner delivers it to another with the intention of transferring ownership, and the transferee receives the article in question with the intention of acquiring ownership.

Before I can deal head-on with the above contentions, it is apposite, at this stage to outline the matters that are common cause and these are they:

(a) the Applicant is the registered owner of the motor vehicle in question in these proceedings;

(b)the Applicant and ABSA Bank Limited entered into an instalment sale agreement in relation to the motor vehicle in question;

(c) at the time when this application was moved, the Applicant had not finished paying all the

instalments under the said agreement in respect of the motor vehicle;

(d) one of the conditions of the agreement was that ownership of the vehicle would pass to the Applicant upon him having paid all the instalments and having complied with all other conditions set out in the agreement.

In order to determine the sustainability or otherwise of the relief sought by the Applicant, it is important, in the first instance, to have regard to the concept of ownership. The learned authors Kleyn & Boraine *{supra)* provide the following definition of ownership at page 161:-

"According to this perception, ownership, is the real right that potentially confers the most complete or comprehensive control over a thing, which means that the right of ownership empowers the owner to do with his thing as he deems fit, subject to the limitations imposed by public and private law."

At page 245, the learned authors make the following important point regarding the transfer of ownership :-

> "The intention of the owner to transfer ownership need not be absolute, but may be conditional upon the happening of an uncertain future event. In other words, the transferor may deliver the thing to the transferee on the understanding that the latter shall acquire ownership of it if a certain condition is fulfilled, that is, the delivery is made subject to a suspensive condition. Similarly, the intention of the transferor may be subject to the existence of a certain state of affairs (that is, a supposition), but in this case ownership passes either immediately on delivery, if the state of affairs does exist, or not at all."

At page 245-6, the learned authors say:-

> "Nowadays the most important cases in which the passing of ownership is conditional are hire purchase or instalment sale transactions...: the goods are delivered to the purchaser, but ownership in them usually remains vested in the owner and will pass to the former only if any when he has paid all the instalments in respect of the purchase price and complied with all the other terms of the agreement. The question whether ownership passes must be further considered in the case of every sale in which the purchaser does not pay the full purchase price *pari passu* with the delivery of goods to him."

As indicated earlier, the motor vehicle in question, was subject to an instalment sale agreement and it is common cause that in terms of that agreement, passing of ownership was subject to a suspensive condition, namely the payment of all the instalments and compliance with all the other terms of the agreement in question. It would appear therefore that the quotation from the learned authors above applies to the instant case regarding the stage at which ownership would have been passed to the Applicant.

Mr. Thwala argued at the time of the hearing of the application that the Applicant had since paid all the outstanding instalments and would in any event have been entitled to retain the vehicle as an owner in terms of the statutory law of the Republic of South Africa, considering, as he put it, that the Applicant had at any rate paid most of the instalments

before hearing. I have also considered the provisions of the Hire Purchase Act, 11 of 1969 and I consider it inapplicable to the instant matter, considering that the Republic of South Africa would appear to have been intended by the parties to have been the *lex loci contractus.* A cursory consideration of the local Act would suggest strongly that the provisions of the Hire Purchase Act would be inapplicable *in* casu, considering the nature of the transaction in question in this matter.

[20] Regarding Mr. Thwala's submission above, it is clear that the transaction in question is governed by the statutory law of the Republic of South Africa. To this extent, it is clear that South African law is foreign law in this country and would, before it is applied to determine any *lis,* have to be proved as a fact by a practitioner duly admitted in that country. Professor C.F. Forsyth, Private International Law, Juta 85 Co. 1981, p.77 states that . . proof of foreign law is treated as a fact - and must therefore, be pleaded and proved by expert evidence."

[21] It is clear, from a reading of the Applicant's papers that he did not seek to have the law he adverts to being proved as a fact as

stated by the learned author. In the premises, I cannot hold, as required by the Applicant that the Applicant was entitled to retain the vehicle as he had at some stage substantially complied with his obligations by paying a substantial number of instalments in terms of the instalment sale agreement.

[22] Mr. Thwala, in a bid to bolster his client's case filed, a notice, purportedly in terms of Rule 35 (14) and (23) of this Court's Rules, headed "Notice Requiring Admission", in which he called upon the 1st Respondent, within 10 days of receipt of the said notice, to admit the documents filed thereunder i.e. a certificate of registration of the vehicle in the Applicant's name and a letter from ABSA Bank confirming that the Applicant had finished paying the requisite instalments in respect of the vehicle.

[23] This is a novel procedure which is moreover wrong. Rule 35 deals with discovery and inspection of documents for purposes of trial and it is generally inapplicable to application proceedings. It is certainly inapplicable to the instant application. I say so because it is clear that the Applicant wished to have the said documents

introduced as evidence and to assist the Court in its determination of the dispute. This could have properly been done in one of two ways. The Applicant could have withdrawn this application and launched a fresh application, based on the "new" documents sought to be introduced. A tender for costs would, in that event have had to be a necessary embodiment to the notice of withdrawal.

[24] In the alternative, the Applicant could have sought leave to file a supplementary affidavit which affidavit would embody the documents sought to be introduced under Rule 35. It would be necessary for the Applicant therein to state cogent reasons why the documents were not supplied earlier and their importance in determining the issue at hand. The latter requirement appears obvious though.

[25] It would appear to me regrettable as it may be, that the Applicant, on the papers properly before Court is not the owner of the vehicle in question and cannot, for that reason, successfully move the *rei vindicatio* application. His remedy, on the present papers

> probably lay elsewhere. I say so because I cannot have regard to the documents sought to be introduced via the Rule 35 Notice as those are irregularly before Court and I cannot have regard to their contents as they come before Court through the back door as it were. My sympathies lie with the Applicant but the law and determination of cases is not determined by whither the sympathies lie.

I am compelled, in the circumstances, to deal with the matter on the papers as they are and I cannot convert the proceedings or the Applicant's cause of action or have regard to matters or documents that are not properly before me in determining this matter. For that reason, I hold that the 1st Respondent's point of law regarding the *rei vindicatio* is meritorious and must be upheld. I do not, in the circumstances, find it necessary to deal with the second requirement to the grant of the *rei vindicatio.*

There is, however, one other matter that I feel strongly about and in respect of which comment is imperatively called for. It is patently obvious from a reading of the papers that as early as 24 April, 2008 i.e

two days after the attachment of the vehicle in satisfaction of the debt owed by Nevil to the 1st Respondent, the 1st Respondent's attorneys were advised that the vehicle did not belong to Nevil and that it was registered in Bonham's name, the Applicant herein.

This was repeated in correspondence up to the day preceding the sale but that did not move the heart of Sipho Matse 85 Company, the 1st Respondent's Attorneys. With all the information at their disposal, the latter firm of attorneys instructed the Deputy Sheriff, who, properly advised, should have filed an interpleader notice in terms of Rule 58, proceeded with the sale. I should add that the allegations contained in the Applicant's papers, as confirmed by his attorneys of record, have not been controverted by the 1st Respondent's attorneys or the Deputy Sheriff. For that reason, they must stand.

I view the conduct, both of the offices of Messrs. Sipho Matse & Company and the Deputy Sheriff in a most serious light. The heartlessness and the removal of reasoning from its seat in dealing with this matter by both the aforesaid attorneys and the Deputy Sheriff was astounding and in my view, borders on unprofessional conduct by the aforesaid parties, who it must not be forgotten, are officers of this

Court. It is ghastly to contemplate that the machinery of this Court is being abused by this Court's very officers to literally supplant property from possessors or even owners with little or no regard for the evidence in their possession which may inexorably tend to suggest that the property should not be attached and certainly should not be sold in execution.

In this regard, it would be remiss of me not to refer this matter to the Disciplinary Tribunal of the Law Society for it to enquire into the conduct of the aforesaid attorneys and to take appropriate action. In the same vein, I also refer the conduct of the Deputy Sheriff concerned to the Sheriff for enquiry and appropriate action. To the extent necessary, I order the relevant offices to be availed all the relevant papers filed of record, including this judgment.

[31] The general rule regarding costs is that costs follow the event. In that regard, the Court exercises a discretion which, as in all other cases, has to be judiciously and judicially exercised. In the present matter, regard had to the conduct of both the 1st Respondent's attorneys and the Deputy Sheriff, I am of the considered view that

it would not be proper to award costs to the 1st Respondent. The conduct by its agents was, as stated above, completely odious. To mark this Court's concern at the conduct by the said officers of the Court, I shall order the offices of Sipho Matse and Company and the Deputy Sheriff to show cause on a date to be fixed, why they should not be ordered to pay the costs of this application *de bonis propiis* jointly and severally.

[32] In the premises, I order the following:-

32.1 The application for the *rei vindicatio* be and is hereby dismissed.

32.2 The offices of Sipho Matse & Company and Mr. Bheki Mavuso, the Deputy Sheriff be and are hereby ordered to show cause on or before 24 April, 2009, why they should not be ordered to pay the costs of the application *debonis propiis,* the one paying the other to be absolved.

32.3 The conduct of the attorney from Messrs. Sipho Matse & Company, who acted on behalf of the 1st Respondent, be and is hereby referred to the Disciplinary" Tribunal of the Law Society for inquiry and decision;

32.4 The conduct of the Deputy Sheriff Mr. Bheki Mavuso be and is hereby referred to the Sheriff for inquiry and decision;

32.5 Both the Law Society Tribunal and the Sheriff shall report to Court in writing on or before 30 June, 2009 as to what action has been taken in compliance with Orders 29.3 and 29.4 above.

[33] Having said the above, the Applicant is, however, granted leave, if so advised, to launch fresh and appropriate proceedings in order to seek the relief or similar relief to that applied for in present matter.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 14th DAY OF APRIL, 2009.

TS MASUKU,
JUDGE

Messrs. Gigi A. Reid Attorneys for the Applicant Messrs. Sipho Matse & Company for the 1st Respondent