IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 320/2021

In the matter between:

CLINT BAILEY	**Applicant**
And	
SABELO GAMEDZE	**1st Respondent**
MBALI GAMEDZE	**2nd Respondent**
COMMISSIONER OF POLICE	**3rd Respondent**

Neutral citation: *Clint Bailey v Sabelo Gamedze & Two Others (320/2021) [2021] SZHC 34 (30 March 2021)*

CORAM : T.L. DLAMINI J

Heard : 12 March 2021

Delivered : 30 March 2021

[1] Law of property – Ownership of property – Right to recover the property from any person who possesses it without the owner's consent.

Summary

Applicant had his motor vehicle locked-in by his brother's landlord for unpaid arrear rentals – The lock-in was done while the vehicle was in the possession of the applicant's brother – The attachment of the vehicle included household items belonging to the applicant's brother – These items were all locked inside the respondents' premises – The applicant sought to have the motor vehicle released to him as owner but the first respondent refused to have it released – Applicant

then filed an application to this court and invoked the rei vindicatio remedy – Rei vindicatio principles considered.

Held - *That the applicant has proved on a balance of probabilities that he is the owner of the motor vehicle, and that the motor vehicle is in the possession of the first and second respondents.*

Held further *– That if the applicant is not the owner and has no title to the motor vehicle, then the averment by the respondents that the vehicle was surrendered by him as security for his brother's arrear rentals is without merit – The applicant would have no authority to surrender the motor vehicle as security for the arrear rentals – And that the respondents would accordingly not receive any title to the motor vehicle from the applicant or his brother – Application therefore succeeds*

JUDGMENT

The application

[1] Before court is an application filed under a certificate of urgency and is founded on the *rei vindicatio* action. The applicant seeks an order directing the first and second respondents to release to him an **Audi A3TFSi** motor vehicle registered **JTZ 236 MP**. The applicant also seeks an order authorizing and directing the third respondent (Commissioner of Police) to provide support and assistance to ensure the release of the motor vehicle to the applicant.

Background

[2] The applicant is a brother to one **Starsky Bailey** who occupied a leased house and became a tenant of the first and second respondents at Plot 79, Komati Street, Fairview North, Manzini. Although it has not been stated in clear terms on the papers, it appears to me that the first and second respondents are husband and wife. Due to unpaid arrear rentals, the said Starsky vacated the leased house on 01 February 2021 and his household possessions remained

under lock therein. Amongst those possessions kept under lock is a motor vehicle that had been borrowed to him, according to the founding affidavit, by the applicant. The applicant first engaged the first respondent in an attempt to get the motor vehicle released to him but unsuccessfully.

Applicant's case

[3] In setting out his case, the applicant contends that he is the owner of the motor vehicle forming the subject matter of these proceedings and that it was unlawfully attached by the respondents while he had borrowed it to his brother who was their tenant. The attachment was in respect of arrear rentals which his brother owed to the respondents.

[4] It is common cause that the aforesaid brother of the applicant had previously been in rental arrears and the applicant came to his rescue and engaged the first respondent. The applicant then paid on behalf of his brother the arrear rentals in July 2020 totaling the sum of **twenty-five thousand emalangeni (E25, 000.00)**. In his submissions, the applicant states that the respondents have now misconstrued his assistance and involvement of July 2020 and seem to be of the view that the applicant is a standing surety for his brother's unpaid rentals. They have therefore seized and detained his motor vehicle as security for the unpaid rentals due and owing from his brother Starsky.

[5] The applicant disputes that he is liable for his brother's rentals. He contends that there is no justification or legal reason why his motor vehicle was detained on account of the unpaid rentals. He further denied the contention by the first respondent that his brother Starsky surrendered the motor vehicle as security for the arrear rentals and submitted that even if Starsky did surrender

the motor vehicle as alleged, he had no authority to bind it for his debts. He therefore has approached this court for an order directing the first and second respondents to forthwith release the motor vehicle to him. He contended that the vehicle was attached by the respondents without a court order.

Respondents' case

[6] In opposition, the respondents filed an affidavit wherein they set out how the vehicle ended up in their possession. Their fundamental contention is that the vehicle was voluntarily given to them as security for the arrear rentals by the applicant himself, and was together with his brother Starsky and Starsky's wife. They also contend that the vehicle was sold by the applicant to his brother Starsky and was therefore surrendered to the respondents to be sold in order to recover the arrear rentals or part thereof in the event the arrear rentals are not paid.

[7] In the heads of argument filed, the respondents raised two points *in limine*, and also contended that it is not clear from the papers whether the application is founded on spoliation or *rei vindicatio*. This became the situation because the applicant pleaded spoliation in the founding affidavit and also the *rei vindicatio* remedy as well.

[8] *In limine*, the respondents firstly submitted that there are dispute of facts which were not only foreseeable to the applicant but were known to exist. Nonetheless, the applicant proceeded to institute motion proceedings instead of action proceedings. The court was referred to an undated letter, at page 29 of the book of pleadings, written by the first respondent to the applicant's attorneys of record informing them that the motor vehicle was offered by the

applicant and his brother as security for the arrear rentals. The agreement, according to the letter, was that the vehicle will be kept by the first respondent until the arrear rentals are paid once the family estate assets are sold for the benefit of the Bailey family, including the tenant Starsky.

[9] The letter also reflects that the vacation of the premises by the applicant's brother and the locking of the vehicle inside the respondents' premises was done after extensive consultations between the first respondent and the applicant and his brother. There is therefore no illegal act that has been committed by the first respondent, according to the letter. It therefore was argued that the averments made by the applicant to the effect that there was an eviction of the tenant and the attachment of the vehicle and the household items without a court order constitutes a serious dispute of fact.

[10] This is not a non-resolvable dispute of fact in my opinion, and it does not require oral evidence, nor does it warrant a dismissal of the application. The tenant confirms in two confirmatory affidavits attached to the founding and replying affidavits that nothing was done by consent when he vacated the rented premises. I quote below what he states in the confirmatory affidavit attached to the applicant's reply:

> 4. I particularly confirm that I unwillingly and grudgingly surrendered the premises situate at Plot 79, Komati Street, Manzini, to the Respondents agents on the said 1st February 2021.
>
> 5. The said Agents of the 1st and 2nd Respondents (were) very uncompromising such that **they did not even permit me or my family to remove our personal clothing from the premises. So, I resigned myself to the situation and left things as they were to avoid any physical confrontation and argument with the Respondents agents**.

> 6. I do further confirm that **my eviction from the aforesaid premises and the attachment of my household property** and that of my family thereat by the 1st and (2nd) Respondents **was done and effected without my consent or a court order but I felt helpless to challenge them**. Currently I am financially strapped to challenge them on the matter. (bold is for own emphasis)

[11] On the basis of the evidence in the affidavits before court, my finding and conclusion, on a balance of probabilities, favours the applicant's case on this disputed piece of evidence. I find no likelihood that a normal person would voluntarily vacate a place that he has used as his homestead without removing anything from the premises. There are basic household items that every family need and uses on a daily basis. Some element of force must be involved for a person to just leave the place he has resided in and used as his homestead without taking items that he might sooner need to use. My conclusion is that the tenant was forced out of the rented premises, and was not allowed to remove anything from them.

[12] The second point *in limine* raised by the respondents is lack of urgency. It was submitted that the applicant failed to satisfy the peremptory requirements of urgency as set out in Rule 6(25) of the Rules of this Court. Rule 6(25) requires the applicant to explicitly set out in its affidavit the reasons that render the matter urgent, and to also set out why the applicant cannot be afforded substantial redress at a hearing in due course.

[13] The respondents also submitted that any alleged urgency is self-created. This is so because it took the applicant 14 days to instruct his attorney to write a letter of demand against themselves. It then took him another 14 days to move the present proceedings. It therefore took the applicant a period of 28 days to approach the court for relief, and it did so on an urgent basis.

[14] The respondents correctly pointed out in my opinion, that the applicant did not set out as required by rule 6(25), particularly rule 6(25) (b), the circumstances which he avers render the matter urgent, and the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. All he has done is to inform the court that he needs to take the car to the Republic of South Africa in order to finalize a deal for trading-in this motor vehicle for a truck. He explained that the trade-in deal was affected by the covid-19 travel restrictions and that he now wishes to take advantage of the eased restrictions and drive the car to the Republic of South Africa before there is another wave of covid-19 that would force the two governments to again strengthen the lockdown travel restrictions. He also stated that spoliation proceedings are by their nature urgent

[15] Concerning the delay of 28 days before moving the application, it would be unfair in my opinion, to blame the applicant for first engaging the respondents for an amicable solution through his attorneys. The consultations that must take place with the attorneys, and the engagements that must then involve the other party against whom a complaint is made, and then receiving feedback which must then be forwarded to the complainant, are a process. In my opinion, the applicant did not sit in his laurel before deciding to move the present application.

[16] On the issue of the trade-in, the applicant has not informed the court about when the deal for the trade-in was agreed, and the point at which it was then disturbed by the covid-19 travel restrictions. The travel restrictions have been eased at different times and are not being eased for the first time. The

court has not therefore been placed in a position to determine if the applicant sat in his laurels or not, before approaching this court under urgency. In my view, a finding is in favour of the respondents on this point *in limine*.

[17] I must mention however, that a finding of the court on whether a matter is to be heard as an urgent one or not, does not, in my view, put the matter to finality. All it does is to decide the issue of whether the matter is to be heard on the basis of urgency or not. It therefore follows that the prayer for an order dispensing with the Rules of Court regarding service, time limits and procedure falls to be refused where the court finds that there is no urgency. The matter ought to be ordered, in my view, to follow the normal course of application proceedings. I am guided by the judgment of the Court of Appeal in the famous **Shell Oil Swaziland (Pty) Ltd v Motor World t/a Sir Motors (23/2006) [2006] SZSC 11 (21 June 2006)** case which enjoins the courts to decide matters on their real merits than on technical points.

[18] On the merits, the respondents pleaded that any claim based on spoliation, which is one of the applicant's pleadings in the founding affidavit, cannot succeed. This is so because the two essential requirements to be satisfied in spoliation proceedings, *viz*., peaceful and undisturbed possession of the thing, and the unlawful deprivation of such possession, cannot be met.

[19] During arguments, the applicant came out clear that his case is founded on the *rei vindicatio* cause of action. His arguments were all in support of this remedy and nothing more. My conclusion therefore was that the spoliation remedy was no longer pursued by the applicant, but only pursued the *rei vindicatio* cause of action.

[20] In law, an owner of property cannot be deprived of his property against his will. If he is so deprived, he is entitled to recover it from any person who retains possession of it without his consent. This is so irrespective of whether that person is a *bona* or *mala fide* possessor. **See: Silberberg and Shoeman, "The Law of Property", 3rd edition, p.273 and 276**.

[21] In respect of both movable and immovable properties, the applicable action is the *rei vindicatio*. What the owner is required to allege and prove in a *rei vindicatio* action is firstly that he is the owner of the thing, secondly, that the thing was in the possession of the defendant when the action was instituted, and thirdly, that the thing must exist, be clearly identifiable and must not have been destroyed or consumed. **See: Chetty v Naidoo 1974 (3) SA 13 at 20; Clifford v Farinha 1988 (4) SA 315 at319**.

[22] The above listed allegations which are to be made must be proved on a balance of probabilities. **See: Chetty v Naidoo (supra) at 20**. **Silberberg and Shoeman (supra) at p.274** states that once the acquisition of ownership has been proved by the plaintiff on a preponderance of probability, its continuation is presumed.

[23] As proof of ownership, the applicant attached **Annexure "CB2"**, being a copy of a Purchase and Sale Agreement between himself and One Stop Spares signed on the 15 December 2018. It shows that the motor vehicle was being sold by One Stop Spares to the applicant for the sum of **One Hundred and Forty Thousand Rands (R140, 000.00)**. It also shows that an amount of **R100, 000.00** was paid as deposit and the balance which remained owing

was **R40, 000.00**. It also reflects **C.M. Bailey** as the purchaser, with an ID number **7310096100017** issued by the **Eswatini** government, with residential address being Lot 1339 Madonsa, Manzini, Swaziland.

[24] The applicant also attached as **Annexure "CB3**" a First National Bank online banking proof of payment for the sum of **R100, 000.00**. Payment was made in favour of **One Stop Spares** and the reference for the recipient reflects **clint m bailey** (the applicant). Delivery of the motor vehicle was made to the applicant by the seller. This is implied, in my view, from the fact that the motor vehicle was brought to the Kingdom of Eswatini and is currently kept under lock by the respondents with household items of the applicant's brother.

[25] In *contra* argument, the respondents submitted that the applicant has failed to prove that he acquired ownership of the motor vehicle. Firstly, they contend that the applicant has not furnished proof that he fully paid the purchase price of the vehicle. It was submitted that this is an important issue because the Purchase and Sell Agreement has a proviso which stipulates that "*the agreement is null and void if the balance is not paid on the due date*".

[26] Secondly, the respondents contend that the certificate of registration attached as annexure 'CB1' shows that the motor vehicle, as at 18 April 2019, was registered in the name of NMI Durban South Motors (Pty) Ltd. The applicant's case, however, is that he purchased the vehicle from One Stop Spares in 2018. It therefore was argued on the respondent's behalf that the applicant has not furnished any proof of an agreement between himself and NMI Durban Motors (Pty) Ltd, which on the papers appears to be the owner

during the month of April 2019. It was also argued that he has not explained how the vehicle is registered in the name of NMI Durban Motors yet it belongs to him. In support of this argument, the court was referred to the case of **Loffel v Prinsloo (15838/12) [2014] ZAGPJHC 213 (15 April 2014)** where **Kgomo J** stated that "*an owner of a motor vehicle as reflected in the registration papers is not a mere figure-head. He is an active actor who cannot be bypassed when that vehicle's ownership is changed"*. To this argument, the applicant submitted that there is a difference between registered owner and title owner. This finds support from the case of **Godfrey Khetho Sibandze v Siligna Development Co. (Pty) Ltd (59/2016) [2017] SZSC 33 (09 October 2017)** where it was stated, and several authorities were cited, that a blue book does not provide evidence of ownership.

[27] The respondent also contended that the applicant is a natural person and the deposit payment of **R100, 000** was paid out of a business account as reflected by annexure 'CB3'. This transaction denotes, according to the respondents' argument, that the money was paid by a business or a trading entity. These are all issues, according to the respondents, that require an explanation by the applicant. This argument was stated to be without support by the applicant who argued that individuals use business accounts for their payments time and again. In my opinion, there is nothing much that turns on to this submission as the proof of payment attached as annexure 'CB3' reflects "**clint m bailey**" as reference for the **R100, 000** payment.

[28] To succeed in a *rei vindicatio* action, ownership must be proved on a balance of probabilities. On the basis of the signed Purchase and Sale

Agreement signed between the applicant and One Stop Spares, I am satisfied that the **Audi A3 TFSi** motor vehicle reflected therein was sold to the applicant.

[29] Concerning movable property, ownership does not pass by entering into an agreement but by delivery of possession accompanied by an intention to transfer ownership on the part of the transferor, and to receive it on the part of the transferee. **See: Loffel v Prinsloo (supra)**. The motor vehicle forming the subject matter of these proceedings was delivered to the applicant after the Purchase and Sale Agreement. It is therefore my finding and conclusion that the applicant has proved on a balance of probabilities that he is the owner of the motor vehicle.

[30] The respondents' contention that the motor vehicle was voluntarily handed over by the applicant and his brother as security for arrear rentals, and their further argument that the applicant is not the owner of the motor vehicle, puts their case in a collision course as they also argued that the applicant sold the motor vehicle to his brother. If the applicant is not the owner, how then does he obtain the authority to pledge this vehicle as security for the arrear rentals? How could he be in a position to sell it to his brother? How could the respondents receive any title to the motor vehicle from the applicant?

[31] I am satisfied that the applicant has on a balance of probabilities proved that he is the owner of the motor vehicle, and that same is in the possession of the respondents. Judgment is accordingly issued in his favour in the following terms:

31.1 First and second respondents are ordered and directed to forthwith release to the applicant the motor vehicle, *viz.*, Audi A3TFSi, engine number CZC286631, with registration number JTZ 236 MP.

31.2 The third respondent is ordered and directed to provide support and assistance to ensure compliance with this order.

31.3 Costs are granted in favour of the applicant at the ordinary scale against the first and second respondents, the one paying the other to be absolved.

T. L. DLAMINI
JUDGE OF THE HIGH COURT

For Applicant : Mr. J. Rodrigues
For Respondent : Mr T.L. Bhembe