

**CIV\APN\358\98**

**IN THE HIGH COURT OF LESOTHO**

**In the Application of :**

**ABSA BANK LTD t/a BANKFIN**

**Applicant**

**vs**

**JESSIE RAMAKATANE**

**Respondent**

**J U D G M E N T**

**Delivered by the Hon. Mr Justice M.L. Lehohla on the 3rd  
day of August, 1998**

When this matter originated it was moved *ex parte* and on urgent basis by the applicant represented by *Mr Mphalane* who appeared in Chambers on 7th October 1996. *Rule Nisi* was granted in terms of prayers 2(a) and (b). The rule in prayer 2(a) was ordered returnable on 28-10-96.

The applicant had asked for an order :

1. Dispensing with the forms and periods of service of this application on the grounds of its urgency.
2. That *Rule Nisi* be ..... issued calling upon the Respondents (*sic*) to show cause, if any, on a date and the (*sic*) time to be determined by this Honourable Court why an order in the following terms should not be made absolute and final.
  - (a) The Respondent should not be ordered to hand over to the Applicant forthwith a Motor Vehicle, namely 1996 Mercedes Benz E320AT with engine No.10499502027955 Chassis No. 210055ZA087811.
  - (b) The Royal Mounted Police should not be authorised to assist the Deputy Sheriff to seize the aforementioned Motor vehicle from the Respondent and hand it over to the Applicant.
  - © The Respondent should not be ordered to pay the costs of this application.
3. That prayers 1 and 2(a) and (b) to (*sic*) operate with immediate effect and as an Interim Order.

On 10th October 1996 this Court had the following notes to write on the file cover :-

“Mr Mphalane for applicant informs court that respondent refuses to comply with Court Order issued on 07-10-96 and further that he has been served with second application for contempt which he holds equally in contempt.

Mr Mphalane prays that respondent be committed to prison for contempt till he complies with Court Order.

Order: Police authority ordered to assist the Deputy Sheriff to effect service and execution of Court Order issued on 7-10-96. Further police (are ordered) to assist the Deputy Sheriff to commit the respondent to prison till such time that Court would be able to determine the extent of the respondent's alleged contempt:

Accordingly Court confirms the 28-10-96 as the return date on which if the respondent is ready to proceed is going to be heard in respect of both the main application and the subsequent one's of contempt.

Signed: M. Lehohla 10-10-96

On 14-10-96; For Applicant : Mr Mphalane

For Respondents : Mr Phafane

Court intimates to Mr Mphalane that Mr Phafane sought to get clarification relating to orders of 10-10-96 and 07-10-96 whereupon Court had asked him to look around for Mr Mphalane so that things which seemed confusing or to have been dealt with haphazardly could be straightened up in Mr Mphalane's presence; such as that the Contempt Application was not served on respondent and other that in the application for joinder which was not in Court's possession at the time it seemed it was uncertain in whose names the vehicle was registered yet respondent was placed in peril of his liberty nonetheless.

As things now stand Mr Mphalane assures Court that he has briefly been in contact with Mr Phafane and they have had some discussion on the basis of which Court orders :

- (1) Suspension of the execution of the arrest order of 1st respondent
- (2) joinder of respondent's wife
- (3) confirmation of the return date as 28-10-96
- (4) That if it should be found, the vehicle subject-matter of the main proceedings, should be kept in the custody of the Deputy Sheriff in a really safe place
- (5) If it is not in respondent's names but his wife's she should disclose where it is so that pending finalisation of main application it should be dealt with as in 4 above.

Signed: M.Lehohla: 14-10-96"

Needless to say the Court is at sea regarding what reaction the above orders have fetched.

However it heard arguments and paid attention to the submissions made by *Mr Mphalane* for the applicant and *Mr Fischer* for the two respondents respectively.

On papers relating to the main application the applicant relies on the founding

affidavit of Vivian Barend Bester starting at page 4 of the paginated record.

The deponent Vivian says he is an employee of the applicant; and as such is authorised by the applicant to depose to this affidavit and to represent the applicant in launching these proceedings as per a resolution marked “VBB” attached to the papers.

The deponent at the start of paragraph 3 at page 5, describes the respondent as Mr B.K. Ramakatane an adult male whose full and further particulars are not known to the applicant save that he resides in Maseru, Lesotho. The Court observes that the initials B.K. preceding the name Ramakatane are crossed out in blue pen and replaced by an initial J also written in blue pen. Most significantly while on the same page where at the end of paragraph 1.3 the initials (VBB) written in black pen are initialled or countersigned presumably by the deponent the alteration in paragraph 3 is neither initialled nor countersigned. The Court observes that the deponent has however initialled or countersigned the bottom of every page of his affidavit and that in respect of every alteration appearing in his affidavit Vivian has appended his signature save the one mentioned above.

At page 71 the Court observes that in her opposing affidavit the deponent

Bertha Ramakatane deposes for clarity as she says, in paragraph 2, that the first respondent to whom she was subsequently joined as 2nd respondent is her husband. Thus it would seem that since her initial must of necessity be B the cancelled initials “BK” at page 5 might not have been entirely accidental when placed by Vivian in the first place only to be altered by someone else subsequently. For my final assessment of the case bearing in mind the usual haste and omissions that accompany preparation of applications of this nature, these observations would deserve due consideration.

Vivian avers that on 28th March 1996 and at Randburg the applicant represented by Eugene van Blerk and Aletta Pretorius (the purchaser) personally entered into a written Instalment Sale Agreement for the sale to the purchaser of the Mercedes Benz car referred to in the notice of motion.

The Court has been favoured with copy of the Agreement marked Annexure “A”.

It appears from the papers that the purchaser failed to meet the terms of the Agreement which required of her to pay R407 520-00 being the total recoverable amount owing and payable in terms of the agreement in 60 equal monthly

instalments of R6 792-00 each with the first such instalment payable on 1st May 1996 and monthly thereafter.

When it came to the notice of the applicant that the purchaser's account had fallen into arrears and she had failed to effect the necessary payments to the applicant the applicant's inquiries led it to believe that the purchaser had disposed of the motor vehicle in question to the 1st respondent. This was in breach of the terms of the Agreement between the applicant and the purchaser. In fact the selling price received by the purchaser's husband's business styled Exclusive Boys Toys CC; was not utilised to settle the amount owing to the applicant by the purchaser. Suffice it to say as at the time of drawing the papers the purchaser was in arrears with her instalment in the sum of R21 297-35 and the outstanding amounts were in the total of R381 697-80.

Thereupon the applicant cancelled the agreement which had been entered on 28th March, 1996.

The deponent avers that having tried relentlessly to discover the whereabouts of the vehicle till recently establishing that it was in the possession of the 1st respondent who resides in Lesotho, he points out on behalf of the applicant that

- (1) the applicant is the owner of the motor vehicle;
- (2) any right to possession which the purchaser had, has been validly terminated;
- (3) the respondent is in unlawful possession of the motor vehicle;
- (4) the applicant is entitled to possession and delivery of the motor vehicle;
- (5) at no time did the purchaser or Exclusive Boys Toys CC have any authority from the applicant to dispose of the vehicle or hand it to a third party.

In her opposing affidavit the second respondent Bertha Ramakatane states that on 17th April, 1996 she and her husband went to Exclusive Boys Toys CC exclusively run by Aletta Pretorius the wife of Okkie Pretorius.

Bertha herself bought and paid for the purchase of the motor vehicle in question in the sum of R390 000-00 cash price. Annexure (BR1) at page 82 is the copy of the sale invoice dated 17th April, 1996.

Bertha says on being aware of the applicant's claim she contacted a Mr Ronnie Flynn who is employed as a salesman by Close Corporation and was



informed that the vehicle was delivered to the showroom floor of Close Corporation end of March 1996 by Cargo Motors a well known Mercedes Benz dealer in the Gauteng Area.

It is the contention of 2nd respondent that judging from the open and unconcealed manner in which the Close Corporation was dealing with the vehicle and the full knowledge and awareness of Ben Van der Walt of applicant's offices the applicant is estopped from alleging that 2nd respondent's acquisition of ownership of this vehicle is questionable. Further that since it is well known that Exclusive Boys Toys CC trades in luxury cars and the Applicant at all material times was aware that Close Corporation was dealing with this vehicle as stock in trade with a view to selling it and was happy to go along with the arrangement as long as outstanding balances were settled the Applicant is precluded from denying that Exclusive Boys Toys CC had the authority to sell this vehicle.

She avers that under the circumstances she is a bona fide purchaser and charges that the applicant while having condoned the practice that they are otherwise estopped from regarding as irregular, was only stung to the quick when Exclusive Boys Toys CC's business struck a bad patch and consequently Aletta and her husband disappeared without trace.

She finally states that on 2nd July 1996 the vehicle in question was sold to Mike Solomons of Seretse Avenue, Gaborone in Botswana for a purchase price of R310 000-00 and prays that for this reason alone the application be dismissed with costs.

She says the applicant was made aware of the fact that the vehicle had been sold prior to the filing of this opposing affidavit and was no longer in her possession. The 2nd respondent is largely supported by the 1st respondent in her contentions. This support has a bearing mainly as to the propriety of having charged the 1st respondent with contempt of court.

Needless to say starting from page 58 onwards Johannes Nicolaas Nel disclaims the purported sale of the vehicle to a Solomons in Botswana. He avers that he secured the cooperation and efforts of the Botswana police concerning the individual called Solomons or the alleged address he is said to have been resident at. In fact Nel discovered that no such road or street existed in Gaborone Botswana. He annexed "JNN3" a recent central street plan of Gaborone in support of his averments.

Ordinarily when the Court is in a situation where it does not know which

type-writer to believe in motion proceedings the approach advocated in law is that the application should be dismissed. But in this matter where it could not be said the applicant must have known when moving this application the sort of defences raised would arise it would be imprudent to adopt that approach especially when gleaning from the Deputy Sheriff's averment that there is a suggestion that the 2nd respondent was advised by her lawyer to suppress the truth regarding the whereabouts of the vehicle in question.

Assuming the truthfulness of the respondents' averments as to acquisition of the vehicle it would make 2nd respondent a bona fide owner though.

I indicated at the beginning that the 1st respondent was put in peril of suffering consequences of a Contempt of Court charges when it turned out that the applicant may well have meant his wife when applying the cancelled B.K. initials before Ramakatane at page 5 paragraph 3 because the tenor of the applicant's case is for retrieval of its vehicle from whoever was keeping it. Available evidence suggests that the car may have been in the possession of the 2nd respondent who is the person claiming she acquired it by purchase.

The Court is not satisfied that the defence is such that the applicant must have

known the intricate goings-on which turn out to have surrounded this matter.

Consequently the only option through which issues may be ventilated in a manner that would enable the Court to reach a just decision would be by converting proceedings herein into a trial where cross-examination would help achieve that end.

I order *mero motu* therefore that

- (1) proceedings be converted into trial and papers filed remain as pleadings;
- (2) the applicant is granted leave to move Court for an alternative claim for damages in lieu of the value of its car;
- (3) the prayer for inclusion of an alternative claim and the application in pursuit of order 2 above respectively to be filed and moved within 14 days of this Order;
- (4) all pleadings to be closed by not later than 31st August, 1998;
- (5) Order (1) of 14-10-96 suspending execution of the arrest order of 1st respondent remains of full force and effect;
- (6) there will be no order as to costs.



J U D G E

3rd August, 1998

For Applicant : Mr Mphalane

For Respondents : Mr Fischer and Mr Phafane