

**GIFT MOYO**

**Versus**

**BRIGHTON SIZIBA**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA & NDLOVU JJ  
BULAWAYO 24 June 2024 & 19 February 2025

**Civil appeal**

*M.E.P Moyo*, for the appellant  
*N. Sithole*, for the respondent

**NDLOVU J:** This is an appeal against the judgment of the Magistrates' Court sitting at Bulawayo granting an application for *rei vindicatio* in favour of the respondent. For ease of reference and where the context permits the parties shall be referred to as in the court *a quo*, that is, the respondent as the applicant and the appellant as the respondent.

### **BACKGROUND FACTS**

The applicant applied for *rei vindicatio* against the respondent in which it was pleaded that on 14 December 2022, the applicant bought a motor vehicle from one Levin Moyo and fully paid for it resulting in an agreement of sale being drawn up. Levin Moyo supported the application by way of an affidavit in which he swore that before he sold the motor vehicle in question to the applicant, he gave the respondent that motor vehicle to use as a taxi. Upon realizing that the motor vehicle was not making any profit he offered to sell it to the respondent. Notwithstanding his acceptance of the offer, the respondent was unable to purchase the motor vehicle as he kept giving promises he never fulfilled. He then told the respondent that due to his inability to pay for the motor vehicle, he [Levin] was looking for a new buyer. The applicant came by and bought the motor vehicle by paying for it in full in December 2022.

When all this happened, the respondent had the motor vehicle. The respondent is now refusing to release it to the applicant.

The respondent opposed the application and argued that he was the rightful owner of the motor vehicle in question. He averred that he purchased the motor vehicle from Levine Moyo on terms and took delivery of the same. Levine Moyo then refused to accept the payment in the form of cattle and said his wife was no longer interested in acquiring more cattle. He offered to get Levine cattle buyers but Levine refused to take delivery of the cattle. It is therefore a lie by Levine that he failed to pay for the motor vehicle. The respondent further averred that the applicant was aware of this payment feud between the respondent and Levine Moyo and its subject matter. The respondent alleged a double sale by Levine Moyo.

In the proceedings in the court *a quo*, the respondent took a preliminary point arguing that the applicant's founding affidavit be expunged from the record for want of authentication. The court *a quo* dismissed the point *in limine* taken and went on to grant the application on the merits, hence this appeal.

### **THE APPEAL**

Aggrieved by the decision of the court *a quo*. The respondent launched this appeal on the following grounds:

1. The court *a quo* erred in fact and law when it dismissed the point *in limine* raised by the Appellant and held that an affidavit which is made outside of the country may be used even when it is not notarized.
2. The court *a quo* erred in law and fact when it held that the respondent was the owner and entitled to vindicate the property when the respondent had failed to prove ownership and when the respondent had sought to prove ownership by unauthenticated affidavit. *[Abandoned at the hearing of the appeal]*
3. The court *a quo* erred in fact and law when it held that the respondent had satisfied all the requirements of *actio rei vindicatio* when in fact respondent had not satisfied any of the requirements. Respondent has never been the owner and has never ever been in possession of the property.

4. The court *a quo* erred in fact and law when it dismissed the appellant's defence that he was no longer even in possession or ownership of the property anymore as he had long sold it to another party.
5. The court *a quo* erred in fact and law when it held that the respondent had proved ownership by producing an affidavit from Liven Ncube when Liven Ncube was not even the owner of the property nor in possession of the property either at the time he purportedly sold it to the respondent or at the time of making the so-called affidavit. *[Abandoned at the hearing of the appeal]*
6. The court *a quo* erred in fact and law when it held that the respondent had failed to substantiate his defence when the same documents [affidavit of Liven Moyo] that the court relied on in finding for the respondent contained the very evidence that the court yearned for; namely evidence that Liven Moyo had sold the vehicle to Gift Moyo before he attempted to sell it to Brighton Moyo. *[Abandoned at the hearing of the appeal]*
7. The court *a quo* erred in fact and law when it ignored the fact not denied by the respondent that in the criminal case, he had been the one that made the report and in it did say that the applicant had already sold the car to Zwelibanzi Gumede. This on its own formulates a defence against *rei vindicatio* that the court highlights as one of the defences to *rei vindicatio*. The court turned a blind eye to this uncontroverted fact. *[Abandoned at the hearing of the appeal]*

## **THE HEARING**

At the hearing of the appeal, the appellant pursued and only argued grounds of appeal No. 1, 3 & 4.

## **ISSUES**

### ***1. Authentication of affidavits.***

The court *a quo* dismissed the preliminary point taken by the respondent. The applicant attached to his application an affidavit by one Levin Moyo. The affidavit in question was commissioned by a Police Officer in the Republic of South Africa. The court *a quo* relied on the following statutory provision to dismiss the preliminary point taken.

Rule 4 of the *Authentication of Documents Rules 1971* provides as follows;

***“4. An affidavit sworn before and attested by a commissioner outside Zimbabwe shall require no further authentication and may be used in all cases and matters in which affidavits are admissible as freely as if it had been duly made and sworn to within Zimbabwe.”***

However as correctly argued by the appellant, the word “commissioner” is defined in the Rules as meaning, ***“a commissioner of the High Court appointed by the High Court to take affidavits or examine witnesses in any place outside Zimbabwe;”*** A member of the South African Police Service is not a commissioner appointed by the High Court of Zimbabwe. The High Court does not have extra-territorial jurisdiction giving to appoint members of the South African Police, commissioners for the purposes of this rule.

The decision not to expunge the offensive affidavit was therefore incompetent. This ground of appeal succeeds.

### ***3. Satisfaction of the requirements of actio rei vindicatio.***

A property owner has a vindicatory right against the whole world in respect of his property. He who brings a *res vindicatio* application is obliged to prove that:

- 1. He is the owner of the property.*
- 2. The property in question is possessed by the possessor.*
- 3. The applicant has not consented to the possessor possessing the property.*

The owner may claim his property from anyone holding that property wherever found. No other person may keep a property from the owner without the owner’s consent or some recognisable and enforceable right against the owner, Once ownership, possession by the possessor, and want of consent on the part of the applicant is proven, the onus shifts to the respondent to allege and establish a right to keep the property. See ***Chetty v Naidoo 1974[3] SA 13. Stanbic Finance Zimbabwe Ltd v Chivhungwa 1999 [1] ZLR 262.*** Proof of ownership is therefore central in an application of this nature.

*In casu*, it is not disputed that the applicant bought the motor vehicle from Levin Moyo. Levin Moyo is the registered owner of the motor vehicle. It is also a common cause that the

motor vehicle is in the possession of the respondent. It is also a common cause that the respondent took possession of the motor vehicle before the applicant paid for it. Upon paying for the motor vehicle the applicant did not take delivery of the motor vehicle.

It is trite that, for a buyer to become an owner of a movable property at law, the buyer must, after paying for the property, take possession of the property. Only then will he be said to be an owner of the property in question because delivery is key and central to transferring ownership of movable property. It can therefore not be said that the applicant satisfied the requirements for *actio rei vindicatio* when it is clear that he did not take delivery of the motor vehicle and consequently no transfer of the ownership of the motor vehicle ever took place from Levin Moyo to the applicant to cloth the applicant with the right to make a *rei vindicatio* application. This ground of appeal succeeds.

#### ***4. Non-availability of the motor vehicle in question.***

With the conclusion, I have made in respect of the ground of appeal number three above, this ground of appeal has become moot. However, for completeness of the appeal it has to be pronounced on as well. As a matter of general application, an owner has a right to recover his property from anyone in possession of it against the owner's consent. One cannot pass a title they do not possess. Such conduct cannot be a defence to a legitimate claim by a lawful owner of the property. As long as the property exists, it is recoverable. This ground of appeal is unsuccessful and therefore fails.

### **DISPOSITION**

The applicant did not prove that he is the owner of the motor vehicle and therefore failed to satisfy a key requirement for *actio rei vindicatio* in his application.

It is trite that costs follow the results, it is accordingly ordered as follows:

### **ORDER**

The appeal succeeds with costs.

The judgment of the court *a quo* is quashed and substituted with the following:

“The application be and is hereby dismissed with costs,”

**NDLOVU J**

**DUBE-BANDA J.....****Agrees**

*Mathonsi Law Chambers, appellant's legal practitioners*  
*Ncube Attorneys, respondent's legal practitioners*