TAPSON MADZIVIRE
versus
OFFICER IN CHARGE VEHICLE THEFT SQUAD (N.O)
and
DETECTIVE SERGEANT G MUUYA (N.O)
and
OFFICER COMMANDING CRIME C I D (N.O)
and
COMMISSIONER GENERAL OF POLICE (N.O)
and
JORDAN FULLER

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 12 March 2020 & 2 June, 2020

Opposed Application

W Chagwiza, for the applicant
T Shumba, for the 1st -4th respondents
M. E Motsi, for the 5th respondent

MANGOTA J: On 27 July, 2014 the applicant purchased a Toyota Hilux motor vehicle with registration number DB12 VRGP from one Hendrick Jacobus Ludik ("Ludik"), a South African citizen. He paid full purchase price for the car but he did not transfer the car into his own name. His reasons for not doing so remain unknown.

At the time of purchase, Ludik told the applicant that he acquired the same on hire purchase arrangement with ABSA, a South African Bank. He told him that he had not yet paid the car's instalments in full.

In 2017, Ludik advised the applicant that ABSA required the car for inspection. The applicant handed the car to one Collin Fuller whom Ludik requested to collect the same from him.

In March, 2018 the applicant discovered that the car was at Mike Harris in Harare where it had been left following an accident. He phoned Ludik who told him that the car was still his because the applicant had not taken transfer of the car. The applicant reported the matter to the police who treated the case as one of theft of a motor vehicle.

In September, 2018 the second respondent who is a member of the police force phoned and advised the applicant that the car had been recovered at the Harare-Bindura Highway tollgate. The fifth respondent was driving it, according to the report which the applicant received.

The second respondent, the applicant states, requested him to produce documentary evidence as proof of his purchase of the car. The applicant furnished the second respondent who was the investigating officer in his case with the statement which Ludik made confirming the sale of the car to him, proof of payments which he made towards the purchase of the car and the car's registration book.

The fifth respondent, the applicant states, claimed to have purchased the car from Ludik. He avers that the fifth respondent did not furnish the police with any evidence which supported his claims.

The police, the applicant states, impounded the car. They said the same was the subject of their investigation. They are in possession of the car to date.

The applicant's statement is that he wrote to the police requesting them to release the car to him pending conclusion of their investigation. The car, he alleges, is kept in an open space where it is exposed to bad weather which, in his view, will cause its condition to deteriorate.

The applicant states that the response of the police to his request was that they did not know to whom they should hand-over the car between the fifth respondent and him. They, he alleges, advised him to apply to court on the basis of which they would act.

It was in consonant with the advice of the police, the applicant claims, that he filed this application. He states that he suffered more than a year of deprivation of use of the car on account of Ludik's fraud. His application, he states, is one for a vindicatory order. He couched his draft order in the following terms:

"It is ordered as follows:

1. The applicant be and is hereby allowed to take into his possession a motor vehicle namely a Toyota Hilux Registration Number ADL 3201 which is currently in the custody of the first respondent pending finalisation of investigations and/or prosecution of the criminal matter under V.T.S.D.R number 9/9/18.
2. The applicant shall produce the motor vehicle whenever it is required as an exhibit by the police, prosecution or court that is seized with the criminal matter concerned.
3. The respondents shall pay costs of suit."

The respondents oppose the application. The first, second, third and fourth respondents are members of the police force in whose custody the car remains. They do not oppose the substance of the application. They, however, raise concern on the issue of costs. They state that they are not the authors of the applicant's predicament. They insist that they should not, therefore, pay costs for the application.

The fifth respondent opposes the substance of the application. He, however, filed his heads out of time and when he was barred. He did not uplift the bar. The same remains operative against him.

The position of the respondents renders the application plain sailing. It is as good as not opposed. The applicant's case would have held with little, if any, difficulty if his house was in order. His house is, unfortunately for him, not in order.

The applicant confuses two legal concepts. He confuses ownership and possession. The two are not synonymous. They are separate and distinct from each other.

A thief, for example, possesses what he has stolen. He, however, does not own the stolen thing. The stolen thing belongs to its owner who can vindicate it from the thief, or from anyone who takes possession of it when the thief passes possession of the same to him.

Thasarus Learners Dictionary defines the verb vindicate to mean to regain possession under claim of title of property through legal procedure (emphasis added)

Rei vindicatio, it is trite, is a common law remedy. It operates on the principle that the applicant, as owner of the property, is entitled to recover his property from whoever may possess it without his consent. It follows, from the stated matter, that an applicant who seeks to rely on *rei vindicatio* must prove that:

(a) he is the owner of the property;

(b) at the institution of the proceedings, the thing or property sought to be vindicated was still in existence - and

(c) the respondent's possession of the thing is without his consent. (*Badela Ndhlovu* v *Spiwe Posi* HH 475-15).

The principle of *rei vindicatio* was aptly stated in *Savanhu* v *Hwange Colliary Company,* SC 8/15 wherein ZIYAMBI JA said:

> "The *actio rei vindicatio* is an action brought by the owner of the property to recover it from any person who retains possession of it without his consent. It derives from the

> principle that an owner cannot be deprived of his property without his consent" (emphasis added).

In *Chetty* v *Naidoo* 1974 (3) SA 13 (A) the court stated, of the vindicatory action, as follows:

> "It is inherent in the nature of ownership that possession of the *res* should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner like a right of retention or a contractual right" (emphasis added).

It is evident, from a reading of the above case authorities, that vindication is associated with ownership. A person vindicates what he owns. He does not vindicate what he possesses.

The heading of this application reads, "Application for a vindicatory order." The case authorities which the applicant cites in his Heads are in consonant with the heading of the application. He states, in paragraph 8 of his Heads, that:

> "8. At law, an owner is entitled to reclaim possession of her or his property. The right to reclaim possession is called *rei vindication*. See the case of *Chetty* v *Naidoo*, 1974 SA 13 (A)" (Emphasis added)

He states, in paragraph 9 of his Heads that:

> "9. It is trite law that to succeed in an action *rei vindicatio*, a party has to establish two essential elements, namely:-
>
> (a) ownership of the thing (whether movable or immovable); and
> (b) that the thing is in the possession of the respondent when the matter was instituted. See *Stanbic Finance Zimbabwe* v *Chivhungwa* 1999 (1) ZLR 262, *Concor Construction* (*Cape*) *Ltd* v *Grantumbank LAA* 1993 (1) SA 930 (A); *Chetty* v *Naidoo* (*supra*)".

The applicant alleges, in para 10, that he established the above mentioned two elements. He claims, in para 11, that he *proved his ownership for the motor vehicle* through such documentary evidence as the agreement of sale and the payments which he made towards the purchase of the car. He contradicts himself in the same when he states that the name which appears in the registration book of the car is that of the seller and not his name, the purchaser.

The applicant's pleadings are completely at variance with the heading of the application and the case authorities which he cites in support of the application. The draft order which he is moving me to grant to him is totally removed from the relief of *rei vindicatio*. It has everything which relates to a claim of possession more than it does to that of vindication whose foundation lies on ownership.

The applicant, it has already been observed, purchased the car. He did not take transfer of the same. He allowed ownership of the car to remain with the seller. He did not realise that he could not apply for a vindicatory order in respect of the car which he does not own. He does not have any real right in the car. All he has is a personal right. This stems from the contract which he concluded with Ludik.

The applicant blames no one for his misfortune but his legal practitioner. He dealt a complete dis-service to him. He slept on duty, so to speak. He did not apply his mind properly to the circumstances of his client's case. He only got out of his slumber during submissions. He had no basis for vindicating a car which, to his knowledge, did not belong to the applicant. He stated, during submissions, that his view was that the applicant's case rested on the remedy of *mandament van spolie*. He stands guilty of dereliction of duty in the observed regard.

What the applicant's legal practitioner suffered from is not unique to him. It is characteristic to a number of legal practitioners whom litigants instruct to represent them in a case. They quickly put pen to paper before they have thought through the exact relief which their clients is moving the court to grant to them.

It is pertinent for a legal practitioner to attentively get a brief from the person who approaches him for legal representation, digest the circumstances of his client's case, read the law which, in his opinion, relates to the case, make a conscious decision to select the branch or sub-branch of the law which is applicable to the litigant's brief after which he proceeds to put pen to paper in preparation of his client's case. The adage which states that more haste less speed should be the guiding rod to the legal practitioner. Where he does his work with the meticulousness of a tooth comb, he serves himself from the ignominy of being embarrassed when he argues his client's case.

The current application is a mixture of many undesirables. It is totally misplaced. The legal practitioner who prepared it could not justify the position which he took in respect of the same. He was asked if he could vindicate a possessory right. He, in response, mumbled, stammered and maintained his silence. His attempt to withdraw the application and refile the same betrayed his awakening from slumber into which he was at the eleventh hour. The damage was, unfortunately for the applicant, already obvious. His conduct was received with a sense of disquiet.

The applicant reposed his whole trust in the legal practitioner of his own choice. He, at all times, remained of the view that his case was unassailable. His case did not hold not because

of any meaningful opposition. It did not, and does not, hold because of the confusion which exists in the same. It was/is a self-destructive application.

The application is so fatally defective that it could not be corrected. What the applicant is moving me to grant to him is possession of the car which the police are having in their custody. His heads, however, speak to ownership which he does not have and not to possession which he should have. The applicant's confusion of the two concepts dealt a fatal blow to his case.

The applicant failed to prove the application on a balance of probabilities. The application is, accordingly, dismissed with costs.

Kwenda and Chagwiza, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st – 4th Respondent's legal practitioners
M E Motsi and Associates, 5th respondent's legal practitioners