

ZIMBABWE HEADS OF CHRISTIAN DENOMINATION
versus
CHRISTOPHER MATAMBUDZI

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 18 January 2016

Opposed matter

Ms *G Wagoneka*, for the applicant
B Chideme, for the respondent

FOROMA J: This is an application for *rei vindicatio*. The applicant seeks to recover its motor vehicle stolen from it by one Archibald Mavhudzi the applicant's former employee who sold it to another. The vehicle in question a diesel Toyota Land Cruiser vehicle registration ABH 0997 2002 model with engine No. 3 L5222622 Chassis No. J.T.E BE 99J1000 14 074 was sold to two persons in succession and the respondent was the last to possess it having bought it from one Tonderai Chitsunde Chief Negomo who bought it from Archibald Mavhudzi. The respondent who was sued by the applicant in the vindicatory application opposed the applicant's claim alleging that he was awarded the vehicle by the trial magistrate at the conclusion of the criminal trial of Archibald Mavhudzi on his application that he be granted possession as an innocent purchase of the stolen vehicle- this in terms of s 60 (1) (a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. He further claimed that since the criminal court had ordered restitution of the value of the stolen vehicle in favour of the applicant as complainant the applicant could not have both the vehicle and monetary compensation. It is important to bear in mind that Archibald Mavhudzi was charged and convicted of theft of trust property i.e. the vehicle in question.

At the end of the hearing of the application I granted the applicant the relief sought in terms of the draft order and indicated that the reasons for the judgement would follow. These are they.

The respondent raised as a point *in limine* that the applicant had adopted the wrong procedure by instituting an application for *rei vindicatio* as he was awarded the lawful possession of the vehicle by order of the criminal court.

The respondent further argued that the applicant ought to have filed a review application against the order of the magistrate. I dismissed the point *in limine* and indicated that the reasons for the ruling would follow.

Section 375 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides in very clear and unambiguous language that the provisions of part XIX of the Criminal Procedure and Evidence Act shall not limit the operation of any other law relating to compensation for loss or dimunition of rights caused by offences or relating to the restitution of stolen or other property and the fact that a person failed to apply for an award or order in terms of that part or was refused such an award or order shall not affect his right to claim any compensation or the restitution any property in civil proceedings. It is clear that the defence raised by the respondent cannot hold against the foregoing clear provisions whose effect is to reinstate rights such as arise from *rei vindicatio*.

On the merits the respondent claimed that he was an innocent purchaser and that the applicant was estopped from denying that he authorised Archibald Mavhudzi from selling the vehicle which he bought as an innocent purchaser.

The defence of estoppel can only be raised by an innocent purchaser who genuinely believed that the seller could lawfully dispose of the merx. The respondent was not such an innocent purchaser as on the papers filed the respondent did not take adequate steps to satisfy himself that the vehicle he was buying was not a stolen vehicle. Had he done so he would have established that the registered owner of the vehicle was not the seller thus put him on his guard.

The applicant did not clear the vehicle with the Vehicle Theft Squad of the ZRP either yet it was vital that he made sure that he would not be acquiring a stolen vehicle. Had he done so he would have realised that the owner of the vehicle (the applicant) the applicant needed to bless the sale before the respondent agreed to part with his cash as the person selling the vehicle was not the one in whose name the vehicle was registered. He did not do so and for that it's a far cry that he should call himself an innocent purchaser of a stolen vehicle.

Whoever sold him the vehicle in question had no real rights in the vehicle to pass on to him. The order he got from the magistrate that he be allowed to retain possession of the vehicle was incompetent given that the complainant who had testified in the trial of Archibald

Mavhudzi had proved beyond reasonable doubt that the vehicle belonged to it and had not abandoned his claim to the vehicle as owner who at law had a right to recover its possession from anyone in possession of the vehicle without his consent.

Theft is a continuing crime and the tainted title in the stolen property will always give away the possessor of the stolen article - See *Stanbic Finance Zimbabwe Ltd v Chivhungura* 1999 (1) ZLR 262 HC where the court observed that the owner may claim his property whenever found from whoever is holding it. It is inherent in the nature of rights of ownership that possession 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. The owner in instituting a *rei vindicatio* need therefore do no more than allege and prove that he is the owner and that the defendant is holding the res, the onus being on the defendant to allege and establish any right to continue to hold against the owner. The applicant has proved ownership of the vehicle in question and the respondent has conceded that the vehicle belongs to it.

The respondent has sought to plead the defence of estoppel i.e to say that the owner is precluded from relying on his ownership of the vehicle because he allowed his former employee to deal with the vehicle as if it had been sold to him. Quite how the applicant did so remains a puzzle as the applicant did not part with the ownership of the vehicle. Besides respondent was demonstrably not an innocent purchaser of the vehicle as he made no effort to clear the vehicle with Vehicle Theft Squad which no doubt he knows exists for the protection of parties intending to purchase vehicles from others.

In the circumstances as the onus of establishing the defence of estoppel lies on the respondent-this respondent has dismally failed to discharge the said onus. It was for these reasons that at the end of argument the applicant's application was granted with costs.

Zuze Law Chambers, applicant's legal practitioners
Mavhunga & Associates, respondent's legal practitioners