

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) No.52 /2021

In the matter between:

**EXECUTRIX ESTATE OF THE LATE
'MAMOSOTHO MOSIUOA - LEPHATSA
APPELLANT**

AND

**TŠOLOANE DOMINIC KIBITI
COMMISSIONER- TRAFIC AND
TRANSPORT
MASTER OF THE HIGH COURT
THE ATTORNEY-GENERAL
ITHABELENG MOLEFI**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

CORAM: K E MOSITO P
P T DAMASEB AJA
P MUSONDA AJA

HEARD: 12 APRIL 2022

DELIVERED: 13 MAY 2022

SUMMARY

Ownership - Movable property - Competing claims - Of purchaser motor vehicle and Executrix of Estate - Purchaser of vehicle through bank - Executrix of Estate of deceased estate

claiming ownership relying on hearsay evidence of statements by deceased and supporting affidavits that deceased had told the deponents that she had bought the motor vehicle purchaser - Executrix of Estate failing to establish ownership as it had relied on hearsay and circumstantial evidence.

Circumstantial evidence - The rules of induction specially applicable to circumstantial evidence discussed and applied - Appeal dismissed with costs.

JUDGMENT

K E MOSITO P

Background

[1] This appeal started as an application in the High Court (Makara J). The appeal arises from a dispute on who owns a specific motor vehicle with registration numbers: MM495; Engine numbers: B20B7052505; VIN: RD 15102513; HONDA CR-V. It started as an application by Mr Tšoloane Dominic Kibiti (from now on referred to as the first respondent) and a counter application by Mrs Lineo 'Masalome Lephatsa (from now on referred to as the appellant). The first respondent sought an order declaring that said motor vehicle is his property. The appellant brought a counter application whereby she sought an order that the motor vehicle forms part of the estate of the late 'Mamosotho Mosiuoa, of which she is administrator and executrix. Both applications were opposed.

[2] The applications were heard on 13 February 2020, and judgment was handed down on 21 October 2021. As per the judgment, the learned judge ordered that:

1. The Executrix sale in relation to the motor vehicle with Registration numbers: MM495; Engine numbers: B20B7052505; VIN: RD 15102513; HONDA CR-Vis stayed;
2. The first respondent is ordered and directed to release from her Executrix duties and the property of the late 'Mamosotho Mosiuoa the motor vehicle with Registration numbers: MM495; Engine numbers: B20B7052505; VIN: RD 15102513; HONDA CR-Vforthwith;
3. The Respondents jointly are ordered to release to the Applicant the motor vehicle with Registration numbers: MM495; Engine numbers: B20B7052505; VIN: RD 15102513; HONDA CR-Vforthwith;
4. Costs of suit are awarded against the 1st Respondent only.

[3] Dissatisfied with the above order, the appellant approached this Court on appeal. She raised seven grounds of appeal against the order. I shall revert to the said grounds later on in this judgment.

Parties

[4] In the founding papers, the description of the parties was not neatly set out with the required particularity, and it was left for the court to decipher who they were from the contents of their affidavits. For example, the applicant described himself as "an adult of Pitseng in the district of Leribe but currently staying at Sehlabeng sa Thuoathe in the district of Berea". The courts were left to assume by looking at the papers holistically that he is a "male Mosotho" and that "staying" means

"resident". There is also no description that Mrs Lephatsa is being sued in her official capacity as an executrix. We only had to decipher this by combining some snippets of averments in the affidavits. This is procedurally unacceptable.

[5] In our civil procedure, the full description of the parties is necessary to establish the locus standi of the litigants and or jurisdiction. Nonetheless, we decipher from the affidavits that the appellant is an attorney of this Court and the executrix of the estate of the late 'Mamosotho Mosiuoa. She is therefore litigating herein in that capacity. We also take judicial notice that Mrs Lephatsa, the Master of the High Court and the Attorney General are officers of this Court. Mr Tšoloane Dominic Kibiti is a male Mosotho adult and an *incola* of this Court.

Factual framework

[6] The facts giving rise to the present dispute are that the late 'Mamosotho Mosiuoa passed on in February 2019. The appellant's case is that there is a somehow reliable circumstantial evidence that the vehicle belongs to the estate of the late 'Mamosotho Mosiuoa. This is based on the explanation that the first respondent bought the vehicle as the agent of the late Mamosotho Mosiuoa, who gave him money to pay for the vehicle. The facts for the appellant are based on the supporting affidavits deposed to by those who say that they heard from the late 'Mamosotho Mosiuoa that she had given the first respondent money to pay for the vehicle.

[7] The first respondent avers that the vehicle subject of the dispute is his property. He attached the registration certificate of the vehicle as well as a record of the Standard Lesotho Bank statement that reflects transactions through which he paid for purchasing the vehicle. He also produced copies of the payment vouchers issued by the Lesotho Revenue Authority upon his payment of the requisite tax fees for the vehicle, including the invoices for the money paid for its purchase from Japan.

Issue for determination

[8] The fundamental question underlying the issue for determination is whether Mr Tšoloane Dominic Kibiti (the first respondent) or the late 'Mamosotho Mosiuoa (herein represented by Executrix Estate of the late 'Mamosotho Mosiuoa - Lephatsa) is the owner of the vehicle in dispute.

The law

[9] The general principle of our law is that ownership in a movable thing passes to another where the owner thereof delivers it to another, intending to transfer ownership to the latter. That other takes the thing intending to acquire ownership thereof. It is a question of fact in each case.¹ Section 8(2) of the Road Traffic Act 1981 provides that:

¹ *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd 1941 AD 369.*

The registering authority shall issue to the owner of a motor vehicle or trailer a registration book (registration certificate) that bears the owner's name in the prescribed form, and this book, or duplicate thereof, shall be proof of the registration of the motor vehicle or trailer, the name of the registered owner, the allocation of the specified registration mark and number to the vehicle.

[10] It is trite law that transfer of ownership of corporeal movable property requires delivery, i.e. transfer of possession, of the property by the owner to the transferee coupled with a real agreement between them. The constituent elements of this agreement are the intention of the owner to transfer ownership and the intention of the transferee to acquire it. Transfer of possession can be either actual or constructive, and it is hardly necessary to say that an agent can act for either the owner or the transferee.

Consideration of the appeal

[11] I now turn to the consideration of the appeal. In his grounds of appeal, the first complaint by the appellant is that the court a quo erred in finding that the motor vehicle belongs to the first respondent. For this ground, Mrs Lephatsa, for the appellant, relied on the affidavit of Lineo Bernadette Mosiuoa, Qekhane Mosiuoa and Sekhonyana Mahase.

[12] The essence of Lineo's affidavit is that the deceased had possession of the vehicle ever since it was bought until she passed on. Therefore, it is contended that the vehicle was

owned by the deceased. In addition, Lineo avers that the late 'Mamosotho Mosiuoa told her sometime in 2014 that she was going to buy a car. She avers that the late 'Mamosotho Mosiuoa went with one Ithabeleng Molefi and came back with the vehicle with a wheel at the back. She avers further that she was present at the customary celebration ceremonies at Maphutseng and Phamong, thanking the ancestors that the late 'Mamosotho Mosiuoa had bought a new car.

[13] Another deponent is one Qekhane Mosiuoa. He avers that he supports Lineo's averments and adds that the deceased called him on the phone sometime in 2014, telling him that she had worked so hard that she had bought a new motor vehicle. He also adds that he was told by his son, Hopolang Mosiuoa, that another customary celebration ceremony was held at Maphutsaneng for the vehicle. Sekhonyana Mahase also deposed to an affidavit confirming that the deceased used to tell him how successful she was, and he, therefore, confirms that the vehicle belonged to the deceased.

[14] Mrs Lephatsa argued that the averments by the supporting deponents above constituted circumstantial evidence from which it can be inferred that the late 'Mamosotho Mosiuoa owned the vehicle subject of dispute in this appeal. In this case, a chain of inferential reasoning is required for the circumstantial evidence argument to succeed. I proceed to consider this question. It will be readily appreciated that the evidence given by Lineo, Qekhane and Sekhonyana in respect

of the deceased buying the vehicle had no independent probative value. Their evidence was a secondary narrative. They, as narrators, repeated on their affidavits what they were supposedly told by either the deceased or Ithabeleng. The probative value of their evidence depended on the credibility of those who told them, the original declarant. Since their informants did not testify to confirm or disavow the averments attributed to them, the credibility of their secondary evidence hangs in the balance. It cannot be readily assessed. It follows, therefore, that the evidence given by the deponents concerning such conversations falls squarely within the ambit of hearsay evidence. Therefore, the more probable inference is that the late 'Mamosotho Mosiuoa did not acquire the vehicle in question as owner.

[15] However, before dismissing the circumstantial evidence in the case, I should draw attention to some additional facts that seem to strengthen further the evidence in favour of the first respondent's case. First, the Certificate of Registration in Respect of Motor Vehicle reflects that the titleholder of the Motor Vehicle in question is one Kibiti DT. Second, it was not disputed before us, nor was it before the court *a quo* that a reference to Kibiti DT in the Certificate of Registration in Respect of Motor Vehicle was a reference to the first respondent.

[16] There can be no doubt; therefore, that the registering authority has issued to the owner of the motor vehicle (Kibiti

DT) a registration certificate that bears the owner's name (Kibiti DT) in the prescribed form, and this book is proof of the registration of the motor vehicle. It is proof of the registered owner's name, the allocation of the specified registration mark, and the vehicle number. So inferential reasoning fails at the first step. Moreover, drawing the other necessary inferences would become progressively more difficult even after passing the first step.

[17] The problem with Lineo's evidence is that because the deceased enjoyed the possession of the vehicle, she was; therefore, the owner thereof cannot be ignored. This version misses the distinction between possession and ownership. The right of ownership at common law is the most extensive right regarding property while possession is restricted. The right of ownership at common law is a real independent right, and it is broad, almost unlimited and absolute in ambit, while possession is not. The main distinction between the two is that possession requires physical custody or control of an object, while ownership is the right through which something goes to someone. When someone has legal rights over a property, they can be said to own it. Thus, the fact that the late 'Mamosotho Mosiuoa had possession of the vehicle did not make her the owner thereof.

[18] The second ground advanced by the appellant is that the court *a quo* erred in finding that the names on the motor vehicle [Certificate of Registration in Respect of Motor Vehicle]

are the *prima facie* evidence of the motor vehicle owner. At the same time, it is not sufficient to establish ownership. I am unable to agree with this contention. Contrarily, I am inclined to agree with the provisions of section 8(2) of the Road Traffic Act 1981 that a registration book (registration certificate) that bears the owner's name in the prescribed form and this book, or duplicate thereof shall be proof of the name of the registered owner to the vehicle.

[19] The third ground raised by the appellant is that the court *a quo* erred in concluding that the appellant had not complied with two cardinal rules of logic applied in considering inference sought to be drawn in testing circumstantial evidence. The essence of this ground is that the court *a quo* ought to have concluded that the appellant had complied with two cardinal rules of logic applied in considering inference sought to be drawn in testing circumstantial evidence. The two cardinal rules of logic are that the inference sought to be drawn must be consistent with all the proven facts. If it is not, the inference cannot be drawn. Second, the proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, there must be doubt whether the inference sought to be drawn is correct.

[20] The above two cardinal logic rules are the core of inferential reasoning in our law. In order to determine whether the court *a quo* erred as claimed by the appellant, I propose to apply the said principles to this case. In doing so, I start by

noting the remarks made by Brand JA in *S v Humphreys*². He remarked that common sense dictates that the process of inferential reasoning may start from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence.

[21] The first logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there was any reason to think that the appellant would be considered the owner of the motor vehicle when there is not a *scintilla* of admissible evidence to support such a prospect. This is more so when the first respondent's evidence reveals that the funds used for the purchase of the motor vehicle were from his Standard Bank account, the motor vehicle registration certificate is in his name, as well as the Lesotho Revenue Authority's proof of payments are all in his names. That foresight would not favour common human experience with other general population members on a preponderance of probabilities. This ground must therefore fail.

[22] The fourth ground raised by the appellant is that the court a quo erred in ignoring all evidence of the appellant and supporting affidavits by the deceased brother, Qakhane Mosiuoa, the deceased cousin, Sekhonyana Mahase and one Hopolang Mosiuoa and most importantly, the evidence of one Mamosiuoa unknown to the appellant and the deceased's family. The evidence of these deponents was characteristically

² *S v Humphreys* 2015 (1) SA 491 (SCA) para 13.

hearsay and inadmissible. In my opinion, it would not be appropriate to admit this kind of evidence. Perhaps Zeffertt and Prizes put the point by saying that:

[h]earsay could not be received if it did not fall within the corners of a recognised common-law or statutory exception. The fact that an item of hearsay evidence was highly relevant or indeed reliable did not alter this fact. However, the primary reason for the exclusion of hearsay was its general unreliability - the fact that it rested for its evidential value on the untested memory, perception, sincerity and narrative capacity of a declarant or actor who was not subjected to the oath, cross-examination or any of the other procedural devices to which our adversary system of trial procedure subjects a witness giving original evidence. In a specific case, these objections were overcome, and the rationale for the exclusion disappeared. However, the evidence had to be excluded in the absence of a recognised exception.³

[23] In my view, this is the kind of evidence that could not be received regarding its hearsay character and failure to pass the inferential reasoning test for circumstantial evidence for which it had been brought. This ground must therefore fail.

[24] The fifth ground was that the court *a quo* erred in finding that the first respondent had proven on a balance of probabilities that the motor vehicle in question is his property without proving the source of income for the payment of the motor vehicle purchase price. As we understand it, the issue before the court *a quo* was whether the first respondent or the

³ Zeffertt and Prizes, *The South African Law of Evidence 2 ed* (LexisNexis, Durban 2009) at 386.

late 'Mamosotho Mosiuoa was the owner of the vehicle in dispute. On the record before this Court, there was no application made to the court *a quo* to direct the first respondent to prove the source of income for the payment of the motor vehicle purchase price. It is trite in several of its decisions that this Court has deprecated the practice of granting orders which are not sought for by the litigants.⁴ Similarly, this Court has denounced relying on issues not raised or pleaded by the parties to the litigation.⁵ In the circumstances, the court *a quo* would not have been entitled to direct the first respondent to prove the source of income for the payment of the motor vehicle purchase price. This ground must therefore fail.

[25] The sixth ground of appeal was that the court *a quo* misdirected itself in not finding the material dispute of fact and turning the matter to trial. It only relied on registration names without weighing it against all other relevant and available evidence to determine who acquired ownership of the vehicle. As this Court pointed out in *Chen Yun Bo v Paballo Martin Theko and Others*:⁶

[6] Mr Chobokoane confirmed before us that in the Labour Appeal Court, nobody asked that Court refer the matter back for the hearing of oral evidence or

⁴ See, for example, *Nkuebe v. Attorney General and Others* 2000 -2004 LAC 295 at 301 BD; *Mophato a Morija v. Lesotho Evangelical Church* 2000 -2004 LAC 354.

⁵ See, for example, *Frasers (Lesotho) Ltd vs Hata-Butler (Pty) Ltd* LAC(1995 -1999)698; *Sekhonyana and Another vs Standard Bank of Lesotho Ltd* LAC (2000-2004)197; *Theko and Others v Morojele and Others* LAC(2000-2004)302; *Attorney-General and Others v Tekateka and Others* LAC(2000 -2004)367 at 373; *Mota v Motokoa* (2000 -2004)418 at 424. *National Olympic Committee and Others vs Morolong* LAC (2000 -2004)449.

⁶ *Chen Yun Bo v Paballo Martin Theko and Others (C of A CIV) NO. 7/2014.*

to trial: hence the complete silence of Mosito, A.J. on that aspect in his judgment.

[7] I conclude that the first ground on which the applicant now wishes to base his appeal to this Court, viz the failure of the Labour Appeal Court to refer the matter to oral evidence or to trial -

(a) seeks to raise an issue which was not canvassed or even raised during the review proceedings in the Labour Appeal Court and was consequently not considered or dealt with by that Court in its judgment;

(b) was in the nature of an afterthought which the applicant now seeks to introduce for the first time at this very late stage in this Court.

[8] A civil court deals, generally speaking, with issues which are placed before it by the parties to the dispute with which it is seized by way of formulation either in pleadings or in affidavits: it is not usually incumbent on the court to find, formulate or resolve issues which the parties have not thus raised. This is especially the case where, as here, the court concerned is exercising its civil review powers. Whilst a court may have powers such as those mentioned in High Court Rule 8(14), which it may in appropriate circumstances and in its discretion exercise *mero motu*, where it does not do so, it does not, generally speaking, lie in the mouth of a party who has not asked it to exercise those powers to complain afterwards that it ought to have done so *mero motu*. ... This, in effect, is exactly what the applicant seeks to do here.... In these circumstances, it is not open to the applicant now in this Court to attack the order made ...on this new ground.

[26] It would have been untenable for the court to have found the existence of a material dispute of fact and turned the matter to trial without any of the parties have moved it. This ground must therefore fail.

[27] The last ground of appeal was that the court *a quo* misdirected itself in awarding costs against the first respondent in this nature without looking at the applicant's conduct regarding the vehicle in question. The issue of the award of costs is a discretionary matter in respect of which an appellate court will be very slow to interfere unless the exercise of the discretion was so outrageous an injustice would result. There is no such injustice to which we were directed in this matter. This Court will not interfere with such exercise of discretion in this kind of case. This ground must therefore fail.

Disposal

[28] On the whole, the circumstantial evidence in the case is, in my opinion, in favour of the case set up by the first respondent that the first respondent owns the vehicle in question. Nevertheless, the evidence in support of this view does not rest there. Furthermore, I propose to deal with statements alleged to have been made by the deceased to several deponents referred to above. These deponents are three in number, viz.: Lineo, Qekhane and Sekhonyana, of the last-named the learned judge, expressly says in his judgment that he did not impress him favourably so that I think that I am entitled to assume that the demeanour of the others did not impress him unfavourably.

[29] However, on the whole, since the credibility of the first respondent is not in any way impugned, I am bound to say that I attach more importance to his evidence than did the learned

judge in the court below. Of the three deponents who deposed to statements made to them by the deceased, theirs are dismissed as hearsay evidence.

Order

[30] The appeal is dismissed with costs.



K E MOSITO
RESIDENT OF THE COURT OF APPEAL

I Agree



P.T DAMASEB
ACTING JUSTICE OF APPEAL

I Agree



P MUSONDA
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: MRS L M A LEPHATSA

FOR THE RESPONDENTS: ADV. E T POTSANE