IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/14/2021**

In the matter between:

REITUMETSE MASOOANE **APPLICANT**

AND

PINKI 'MAREITUMETSE MASOOANE **1st RESPONDENT**
OFFICER COMMANDING THETSANE
POLICE STATION **2nd RESPONDENT**
COMMISSIONER OF POLICE **3rd RESPONDENT**
ATTORNEY GENERAL **4th RESPONDENT**

Neutral Citation: Reitumetse Masooane vs Pinki 'Mareitumetse Masooane and 3 Others (CIV/APN/14/2021) [2021] LSHC 38 (22 APRIL 2021)

JUDGMENT

CORAM: **MOKHESI J**

DATE OF HEARING: **10TH MARCH 2021**

DATE OF JUDGEMENT: **22ND APRIL 2021**

SUMMMARY:

PROPERTY LAW: *Rei vindicatio and revocation of remuneratory donation- Principles applicable discussed and applied- the applicant was donated a BMW sedan by her parents, and on the souring of the relations between herself and her mother, she left the maiden home- when the applicant left the maiden home her mother held on the vehicle on the basis that she was revoking the donation on account of her disrespect, thereby prompting the applicant to launch this application based on rei vindicatio- Application granted with no order as to costs.*

ANNOTATIONS:

LEGISLATION:

Road Traffic Act No.8 of 1981

CASES:

Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd [1992] ZASCA 186: 1993 (1) SA 77 (AD)

Chetty v Naidoo 1974 (3) SA 13 (A)

Sorvaag v Pettersen and Others 1954 (3) SA 636 (CPD)

Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd 1999 (2) SA 986 (T)

Graham v Ridley 1931 TPD 476

Ruskin, N.O. v Thiergen 1962 (3) SA 737 (A)

Ruskin, N.O. v Thiergen 1962 (3) SA 737 (A)

Avis v Verseput 1993 AD 331

Commissioner, South African Revenue Services v Marx NO 2006 (4) SA 195 **(c)**

Benoni Town Council v Minister of Agriculture and Credit 1978 (1) SA (T.P.D.) 978

Kay v Kay, 1961 (4) S.A. 257 (A.D**)**

DE and Another v C E and others (3991/19) [2019] ZAWCHC 142; [2020] 1 All SA 123 (WCC) (10 October 2019)

Mbangamthi v Sesing-Mbangamthi LAC (2005 – 2006) 295

Sonia (Pty) Ltd v Wheeler 1958 (1) SA 555 (AD)

Grasso v Grasso 1987 (1) SA 48 (C.P.D)

Commissioner for Inland Revenue v Estate Hulett 1990 (2) SA 786 (AD)

[1] This case represents a family feud so terrible that a mother and her biological daughter see each other as mortal enemies, what a terrible turn of events. The animosity between the two individuals has escalated to point where the daughter left the maiden home to seek refuge for herself and her minor son, elsewhere. This application was brought on an urgent basis seeking interim reliefs which were granted by a Duty-Judge unopposed. The main relief pending, being one based on *rei vindicatio* is the subject of this judgment. The subject-matter of this *rei vindicatio* is a black BMW 1 series, 2007 model which the applicant's parents had bought for her for ease of transporting her minor child to a nearby border town of Lady Brand in the Republic of South Africa. The said child undertakes daily cross-border commute to school.

[2] The factual background to this case is largely common cause and uncomplicated: The applicant is the biological daughter of the 1st respondent. As already said, there is a family feud which culminated in the applicant leaving her maiden home. The circumstances which led to her leaving are disputed, but nothing turns on those disputes as will become apparent in due course. She left behind a vehicle the subject matter of these proceedings which she alleges was not out of her volition but because the 1st respondent unceremoniously expelled her and kept the vehicle as she claims belongs to her. The applicant has a minor child born out of wedlock and owing to the fact that the said child attends school and commutes daily thereto, the former's parents bought her a BMW car for ease and convenience of commute for the said minor child.

[3] The said vehicle is fully registered in the names of the applicant and is currently in possession of the 1st respondent who is holding on to it on the basis that she is the one who bought it, and that it was registered in the

names of the applicant to obviate the need for the latter to constantly produce proof (to border officials) of approval of the owner whenever she makes the stated cross-border daily trips. It is the applicant's case that the vehicle was donated to her by her parents and therefore is its registered owner and is therefore, entitled to claim it from whomsoever is holding it against her will. On the other hand, the 1st respondent argues that indeed the vehicle was a donation and is therefore entitled to hold on to it on the basis of the applicant's gross ingratitude towards her.

[4] The applicant in an application based on *rei vindicatio* must prove and allege:

a) Ownership of the thing sought to be vindicated **(Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd [1992] ZASCA 186: 1993 (1) SA 77 (AD) at 82: Chetty v Naidoo 1974 (3) SA 13 (A) at 20C)**

b) That the thing still exists and is clearly identifiable **(Sorvaag v Pettersen and Others 1954 (3) SA 636 (CPD) at 639; Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (PTY) Ltd 1999 (2) SA 986 (T) at 996 C – D, 1011 A – B)**

c) That the respondent was in possession of the thing at the time of the initiation of the proceedings **(Chetty v Naidoo supra; Graham v Ridley 1931 TPD 476).**

[5] As the above authorities indicates, *rei vindicatio* is a vindicatory relief, and therefore, the onus is on the applicant to prove title of ownership to the thing. This is the first hurdle that she/he must clear (**Ruskin, N.O. v Thiergen 1962 (3) SA 737 (A) at 744 A – B).**

Ownership of motor vehicles in this country is regulated by the **Road Traffic Act No.8 of 1981** (the "Act"). In terms of this Act, motor vehicle owner is defined in section 2 as:

> *" "owner" in relation to a vehicle includes a joint owner of a vehicle and when a vehicle is the subject of a hire – purchase agreement, includes the person in possession of the vehicle under the agreement."*

[6] In terms of S. 6 (1) of the Act, no person shall own, possess or use a motor vehicle unless it is registered in Lesotho under the Act. Under s.7 the Act provides that:

> *"7(2) The registering authority shall issue to the owner of a motor vehicle or trailer, a registration book 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 of the vehicle."*

[7] What the Act does in terms of the above section is to stipulate that the registration or certificate is a *prima facie* proof of ownership of the motor vehicle, it creates a rebuttable resumption of ownership in favour of the person whose names the vehicle is registered. Therefore, in order to dislodge this rebuttable presumption, a satisfactory proof of ownership must be adduced. Registration certificate provides the best evidence of ownership of the motor vehicle.

[8] It is common ground as alluded earlier that the applicant is the registered owner of the vehicle in question. The 1st respondent seeks to create a dispute by alleging that the vehicle in question belongs to her and her

husband as they bought it for purposes of ferrying the applicant's son to school across the border in South Africa, however she does not adduce any proof of ownership other than bald allegations that the applicant was fully aware when she was bought the vehicle that it still belonged to her and her husband. I have already said that in terms of our law registration of the motor vehicle in terms of the Act and the issuing of a certificate of registration is *prima facie* proof of ownership thereof. In order to rebut this presumption, the 1st respondent must produce satisfactory and adequate proof of ownership, and in this case, she has failed to do so other than making bald allegations of ownership. It follows that the applicant has succeeded in proving ownership of the vehicle. The applicant has also succeeded in proving the other two requirements, *viz*, (i) that the vehicle is still in existence and clearly identifiable, (ii) that when she instituted these proceedings the vehicle was in the possession of 1st respondent.

[9] Having thus determined that the applicant has succeeded in proving the requirements of *rei vindication*, what now remains to determine is whether the 1st respondent has successfully advanced a defence for her possession of the vehicle in question. It is trite that among the defences open the 1st respondent is that (i) the applicant is not the owner of the vehicle in issue, (a matter she has dismally failed to do) (ii) the respondent needs to establish that she has a right to retain the vehicle (*ius possidendi*) or a contractual right:

> *"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 (e.g. a right of retention or a contractual rights). 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 (of Jeena v Ministry of Lands 1955 (2) SA 380 (A) at 382E, 383)" **(Chetty v Naidoo supra).**

[10] The 1st respondent is contending that she has revoked a donation she made to the applicant. The question is whether the donation made in these circumstances is revocable. But before that question is answered the legal nature of a donation must be appreciated, and whether it constitutes a defence cognisable in law against *rei vindicatio*. Donation is a contract whereby one person under no legal obligation, but for no other reason other than out of sheer benevolence or liberality and generosity, gives away his property to another for that other person thereby to become the owner thereof, for which no consideration is expected in return (**Avis v Verseput 1993 AD 331 at 364).** So, two elements must be present, (i) intention (*animus donandi*), (ii) generosity (*liberalitas*), or liberality (*munificentia*) (see: **Commissioner, South African Revenue Services v Marx NO 2006 (4) SA 195 (c) at para. 24).**

[11] In our law a distinction is drawn between 'remuneratory donations' and 'non-remuneratory' or 'true donations.' It is trite that only 'true donations' are revocable on the ground of ingratitude on the part of the donee or because of non-compliance with the *modus* by the donee **(Avis v Verseput (supra) at 369:** see also**: Benoni Town Council v Minister of Agriculture and Credit 1978 (1) SA (T.P.D.) 978 at 990)**. This was made plain the case of **Avis v Verseput, supra.** In summarising the effect of **Avis v Verseput**, in **Kay v Kay, 1961 (4) S.A. 257 (A.D)** at p.260H, Ramsbottom, J.A. said:

"The law relating to the revocability of donations was fully considered in Avis v Verseput, 1943 A.D. 331. The question in that case was whether a 'donation' which the appellant clamed to revoke was revocable either (insofar as it exceeded £500) on the ground of non-registration, or, alternatively, on the ground of ingratitude of the part of the respondent. In order to decide that question TINDALL, J.A., reviewed the authorities to determine what donations were revocable in our law. In his view, the only donations which are revocable are donations properly so-called; that is, donations which are made from sheer liberality. The learned Judge summarized his opinion in the following passage (at p. 366).

> *'In my opinion the question whether a donation promised verbally arose from sheer liberality or not is one of fact which can be proved by a balance of probabilities. Of course, the court cannot profess to be able to define what was in the donor's mind. But the proved facts may, in a particular case, be strong enough to justify inference as to the donor's real motive. I use the word motive in its ordinary sense – that which moves or induces a person to act in a certain way, a reason which influences a person's volition; see shorter Oxford Dictionary. In my opinion the Roman-Dutch authorities, in saying that a genuine donation is one made out of pure liberality, mean a donation in which the donor's motive (using the word in the above sense) is liberality, that is that liberality is the reason which influences him to make the gift…'*

Watermeyer, A.C.J., made an independent review of the authorities and reached the same conclusions which he expressed (at p.353) in these words:

> *'The conclusion to be drawn from these authorities seems to me to be that in Roman-Dutch law remuneratory donations are exempt from the restrictive rules governing donations in general by reason of the fact that they are not inspired solely by a disinterested benevolence but are, as a rule, made in recognition of or in recompense for, benefits or*

services received, an are therefore akin to an exchange or discharge of a moral obligation. Whether or not depend principally upon the move inspiriting the gift.'"

[12] It is common cause that what we are not dealing with in this case is a true donation. As already said a true donation revocable on the bases of non-compliance with modus or ingratitude on the part of the donee. There are at least five species or genera of ingratitude:

"Ingratitude has five species or cases:
(1) If the donee has sought to take the life of the donor;
(2) If he has laid violent hand upon him;
(3) If he has grievously insulted him;
(4) If he has wrought great damage to his property;
(5) If he has not observed the terms expressed object of the donation which was made" (**Benoni Town Council v Minister of Agriculture Credit, supra at p.988), quoting from Gane's trans. Vol.1, p.477).**

[13] Although, as can be seen, non-compliance with *modus* is mentioned as a sub-specie of ingratitude, however, Tindall, JA in **Avis v Verseput (supra)** at p. 369, made it plain that that conduct can correctly be characterised as a breach of contract. For ingratitude to constitute a revocable ground, it "must be of a sufficiently serious nature (for example it must have caused the donor considerable financial loss and must be accompanied by *dolus*). **(LAW SA vol. 8 Part 1 2nd ed. 2005** para 310, quoted by the court in **DE and Another v C E and others (3991/19) [2019] ZAWCHC 142; [2020] 1 All SA 123 (WCC) (10 October 2019)).**

[14] Reverting to the instant matter, in order to succeed, the 1st respondent bears the onus of proving that she has either a right of retention or a contractual right enforceable by her against the applicant as the owner of the vehicle. In the instant case, the 1st respondent has not done this, instead she is holding onto the vehicle forcibly against the applicant' will without recourse to the courts, on the basis that she has revoked the donation. The 1st respondent is resorting to the rule of might and brute force instead of judicial recourse. She is resorting to self- help to recover the property which she donated to the applicant. This, she is not allowed to. Our law does not countenance self-help, as such conduct which is bound to lead to breach of the peace must be nipped in the bud (**Mbangamthi v Sesing-Mbangamthi LAC (2005 – 2006) 295 at 301 C – D).** Although the rule against self-help is often emphasised within the context of spoliation proceedings, it is in my judgment equally applicable in circumstances of this case. If the 1st respondent was desirous of revoking the donation (if ever it is revocable) she should have sought an order declaring that the donation has been cancelled and a further order for restitution of the property. To allow a situation where because the 1st respondent is in an advantageous position of having the vehicle in her possession to then say verbally that she has revoked the donation and is simultaneously taking back the vehicle is not countenanced by law.

[15] I am fully mindful that in contract law an election to rescind or cancel the contract is a unilateral decision of the innocent party which requires no judicial confirmation, the decision to cancel being that of the party not the court (**Sonia (Pty) Ltd v Wheeler 1958 (1) SA 555 (AD) at pp. 560 H – 561 H).** Even if cancellation is a unilateral decision, for the property to be restored to her, the 1st respondent had to seek a remedy of restitution *in integrum*. Without an order that a vehicle be restored to her, the 1st

respondent could not seriously be heard to say she has a right of ownership over it by virtue of the fact that she is already in possession of it. So, in short judicial intervention was unavoidable in order for the 1st respondent to ultimately lawfully have the vehicle revert back to her as the owner. It follows that she has failed to prove any right of retention or a contractual right enforceable against the applicant.

[16] In the present matter the 1st respondent has not counter–applied for a declaration confirming her revocation of the donation nor sought *restitutio integrum.* Instead, vaguely, she argues that the applicant has been rude to her hence her decision for taking back the vehicle. She does not even say in her papers that she has revoked the donation. She merely contends herself with saying the applicant left the vehicle in her possession because it belongs to her. That she is not the owner has been dealt with earlier, however, what is interesting is that when heads of argument were filed, the 1st respondent counsel, Adv. Letompa, approached the matter on the basis that the donation had been revoked that is why the 1st respondent is holding onto the vehicle. I have already said that she is not allowed to that in the absence of the order ordering restitution of same. However, given that the factual matrix of the respondent's case can be said to have foreshadowed (although vaguely it must be said) the argument on revocation of donation, I allowed Adv. Letompa to argue the matter along those lines. Adv. Molapo for the applicant did not find it prejudicial as he argued the matter, nonetheless.

[17] I have already dealt with the issue that the 1st respondent does not have a defence to the applicant's *rei vindicatio,* but because she seems to harbour a misguided notion that the type of donation she made is revocable, I felt

that there is a need to dispel that motion once and for all because she raised it and was argued by both counsel.

[18] Perhaps at the risk of being repetitious, in her answering affidavit, the 1st respondent avers that the reason for buying the vehicle for the applicant was the following:

> *"14. I took care of Applicant's baby, who is now seven years old, from birth until the day she left the family home with him. Since Applicant was still a student and a father of the baby did not bother with the child's welfare, I assumed full responsibility of Applicant and her child and the said minor child attends school in Ladybrand Primary School.*
>
> *15. ...*
>
> *16. ...*
>
> *17. I work at the Ministry of Trade as such, due to covid 19 pendemic (sic) and the movement restrictions, school transport became expensive for the Applicant's minor child as vehicles from Lesotho were no more allowed to cross the border to the South Africa I therefore had to wake up early every morning to take Applicant's minor child to school in Ladybrand then come back to go my work (sic). This was a very tiring experience.*
>
> *18. I then suggested to Applicant that she should take driving school classes in order to lessen my everyday travelling burden, she agreed. After applicant completed classes, I informed her that since she does not have an employment as yet, I will buy a vehicle which she will use to transport her minor child to and from school."*

[19] So, the 1st respondent in no uncertain terms is saying the reason she bought the vehicle was not out of sheer liberality and generosity, but instead out of moral duty to help her grandchild in his daily commute between Maseru and Ladybrand. This was clearly not a true donation but a remuneratory one, induced by the sense of moral obligation on the part of the 1st respondent to help her daughter and grandchild. This donation is irrevocable on the basis of ingratitude as the 1st respondent would seem to think. In an analogous situation, in the case of **Grasso v Grasso 1987 (1) SA 48 (C.P.D)** in an action for divorce the defendant counter-claimed and claimed that the house and a car (BMW) he donated to his wife (plaintiff in the main) be returned to him as he was purportedly revoking the said donations. The court made it plain that that donation was irrevocable because it was not a pure donation, and this is what the court said at p. 55D –G:

> *"I am satisfied that the registration of the house in plaintiff's name was no gesture of beneficence made by defendant to plaintiff, motivated by a sense of liberality or generosity on his part. The present home in which plaintiff is still residing with her two children is hers because – as already stated – of the plot on which it was erected to be passed by the seller into plaintiff's name and he built the house thereon because he intended to provide her (and the children) with a home of their own in substantiation of what he perceived his duty to be – though strictly speaking, the transaction was a donation, it falls outside the prohibition against donations…*
>
> *The position is the same with the BMW motor car. This vehicle was not left to plaintiff nor did defendant ever have the intention of donating it to her in fulfilment of some sense of liberality on his part. Plaintiff was given the car specifically for family use; viz for fetching and carrying the children from and to school…"*

[20] In order for a donation to qualify as a pure donation as against remuneratory donation "sheer liberality of disinterested benevolence must be the only motive" **(Commissioner for Inland Revenue v Estate Hulett 1990 (2) SA 786 (AD) at 801 G – H).** The 1st respondent's donation to the applicant was inspired by nothing other than moral obligation to help her daughter and grandchild. It was, therefore, not a true donation, and is consequently irrevocable (see; **Kay v Kay** supra at para.10)

[21] **COSTS:**

This matter involves a family dispute, and in the exercise of my discretion, no order as to costs will be made.

[22] In the result the following order is made:

a) The application is granted as prayed in terms of prayers 2 of the Notice of Motion.
b) There is no order as to costs.

MOKHESI J

For the Applicant:	**Adv. Lepeli Molapo** **Instructed by C. T. Poopa Attorneys**
For the 1st Respondent:	**Adv. Letompa** **Instructed by Mosotho Attorneys**
For 2nd and 4th Respondents:	**No Appearance**