

GODFREY MAGUTA  
versus  
TIMOTHY MUVANGO  
and  
OFFICER IN CHARGE VEHICLE THEFT SQUAD  
SOUTHERN POLICE

HIGH COURT OF ZIMBABWE  
MANGOTA J  
HARARE, 19 September, 2017 and 13 December, 2017

### **Opposed application**

*E. T. Nhachi*, for the applicant  
*B Maruwa*, for the 1<sup>st</sup> respondent  
2<sup>nd</sup> respondent in default

MANGOTA J: Three persons stand out in this application. These are the applicant, one Amos Phiri and the first respondent. I shall respectively refer to them as Maguta, Phiri and Muvango.

Maguta filed the current application. He stated that he purchased a Toyota Corolla motor vehicle with registration number ADW 4685 [“the vehicle”] from Phiri. He said he purchased it in March, 2016. He paid \$6000 for the vehicle, according to him. He moved the court to declare him the owner of the vehicle.

Muvango opposed the application. He stated, *in limine*, that the same contained a material dispute of fact. The dispute, he averred, centred on who, between Maguta and him, owned the vehicle. He insisted that the dispute could not be resolved on the papers. He moved the court to dismiss the application with costs on the mentioned basis. He stated, on the merits, that Phiri did not sell the vehicle to Maguta. He averred that, if the sale took place as Maguta alleged, Phiri would have brought to him the proceeds of the sale. He said he received nothing from Phiri. He submitted that the vehicle belonged to him because, as he said, no sale of the vehicle took place. He, accordingly, moved the court to dismiss the application with costs on an attorney and client scale.

That the vehicle belonged to Muvango requires little, if any, debate. Annexure A which Muvango attached to his opposing papers provides ample evidence of the stated matter. The annexure is an affidavit which Phiri swore to on 4 December, 2015. It reads, in part, as follows:

“AFFIDAVIT

I, Amos Phiri of I.D. 15-132590R15

(FULL NAME AND NATIONAL REGISTRATION NUMBERS)

Residing at 118, Block 23, Zambezi Flats M/Reign, HARARE

Do hereby solemnly and sincerely swear/declare the following:

The following details and cars which I am mandated to sell, rightfully belongs (sic) to Timothy Muvango:

- Vehicle No. 1-Toyota Corolla, Chassis #NZE 121-0148805
- Vehicle No. 2 .....
- Vehicle No. 3.....
- Vehicle No. 4.....

The above four vehicles are under my custody and I am only being authorised to sell them on his behalf.

I make the above statement conscientiously believing the same to be true.

Signed .....

Signed before me at HARARE this 04<sup>th</sup> day of December, 2015.

Signed .....  
[Commissioner of Oaths]”

Annexure B which Muvango attached to his papers shows, in clear terms, the mandate which he conferred on Phiri to sell the Toyota Corolla motor vehicle. It reads, in part, as follows:

“VEHICLE ENTRY CONTRACT

This serves to confirm that Tom and Jerry vehicles (the sales agent) has entered into an agreement with seller and has also been given mandate to sell and full authority from owner to sell the vehicle.

Agent details

Full name: Amos Phiri

I.D. No. 15-132590 R 15 contact no. 0772 915 886

Seller details

Full name: Timothy Muvhango  
ID No:59-082647 S 83  
Address : 8255 Unit K, Seke, Chitungwiza  
Phone/Cell : 0773 080 304  
Type of body : Toyota Corolla, Sedan  
Make & Model : Toyota Corolla  
Engine No: TBA  
Chassis No : NZE 121-0148805  
Year and colour : Gold  
Reg No: TBA  
Price : USD\$7500

TERM AND CONDITIONS

:  
:  
:  
SIGNATURE (.....) date .....” [emphasis added].

It is on the basis of the abovementioned two annexures that it was claimed that Phiri sold the vehicle to Maguta. Whether or not a sale of the vehicle took place does, in a large measure, depend on the evidence which Maguta filed in support of the application.

Maguta attached Annexures A and B to his application. The first is an agreement of sale of the vehicle. He said he concluded it with Phiri on 23 March, 2016. The second is an affidavit which Phiri swore to on the mentioned date.

Muvango questioned the authenticity of Maguta’s first annexure. He submitted that the annexure did not prove that a sale of the vehicle took place between Maguta and Phiri. He rested his argument on the allegation that Maguta did not sign the annexure.

Maguta’s response was that he signed the annexure. He stated that the missing last page resulted from a photocopying error. He attached to his answering affidavit the same annexure with the last page which he said was missing from the one which he attached to the founding affidavit.

The annexure which Maguta attached to the answering affidavit shows that both Maguta and Phiri signed an agreement of sale of the car. They did so on 23 March, 2016. The criticism which Muvango raised in regard to the authenticity of the annexure is, therefore, without merit. Annexure A as read with Annexure B shows, without doubt, that Phiri sold the motor vehicle to Maguta on 23 March, 2016. Phiri stated in the second annexure that he sold his Toyota Corolla motor vehicle with registration number ADW 4685 and chassis number NZE 121-014885, gold in colour to Maguta for the sum of \$6000 which amount the latter paid in full.

Four elements constitute a contract of sale. These are:

- (i) *emptor et venditor* [buyer and seller- parties who are capable of entering into an agreement of sale];
- (ii) the *merx* [the thing or things, the subject matter of the agreement];
- (iii) the *pretium* [the price in money or what is readily ascertainable in terms of money];
- (iv) *consensus ad idem* [the mental consent of the contracting parties]

[See Norman's *Purchase and Sale in South Africa*, 4<sup>th</sup> edition, p 2]. G. Bradfield. K. Lehman state in *Principles of the Law of Sale & Lease*, 3<sup>rd</sup> ed, p 24 that:

“For a contract to be considered one of sale, the identifying features, or essential elements (*essentialia*), of a contract of sale must be present : the seller must intend to sell and the buyer to buy, and there must be agreement on the subject matter of the sale and on a price to be paid for it. In the absence of agreement on these aspects, the contract is not one of sale.”

The elements of sale which the learned authors stated in their respective texts are present in Maguta's annexures. Phiri and Maguta (the parties) sold to each other the Toyota Corolla motor vehicle (*merx*). Maguta paid Phiri the sum of \$6000 (price). Their minds were *ad idem* on the point that Phiri was selling and Maguta was buying the car. Their contract of sale was, to all intents and purposes, one of sale.

Annexures A and B which Muvango attached to his opposing papers show that Muvango conferred authority on Phiri to sell the vehicle. Phiri was, therefore, his agent. The sale of the car was with the specific authority of the owner of the car. Muvango's intention was to have the car sold.

Whether or not Phiri passed the money which resulted from the sale of the car to Muvango cannot vitiate the sale which took place. Phiri was his agent and, where he acted dishonestly with his principal, the dishonesty cannot be visited upon Maguta who is, after all, an innocent purchaser of the motor vehicle. Maguta has to content with his agent's dishonesty.

Muvango's assertion which was to the effect that Phiri used the Toyota Corolla as security for what he (Phiri) owed to Maguta cannot hold. The statement is misplaced.

A reading of Annexure C which Maguta attached to the application shows that Phiri did not ever use the vehicle as security for any debt which he owed to Maguta. The relevant portion of the annexure reads:

- “3. I still recall sometime in December, 2015 the two accused persons (i.e Phiri and another) approached me whilst I had a Honda Fit blue in colour ... saying that there was a ready buyer for the car.
4. The two said they were representing a client which (*sic*) wanted four cars but could not pay in cash but would spread the payment for six months.
5. We then entered into the agreement saying after the payment of the full US\$6000 the car will belong to their client and there (*sic*) were supposed to pay me US\$1000 monthly. Failure to honour that agreement will give me power to repossess the motor vehicle without giving them anything back.
6. We signed the agreement contract for this motor vehicle.
7. On 25 January 2016 we made another similar agreement of their client on a Honda Fit.
8. In the month of January 2016 I did not receive any instalment of the motor vehicle (*sic*) then I made a follow (*sic*) and they only managed to pay US\$2000 in the month of February 2016.
9. After failing to pay the instalment in March 2016 as per agreement they approached me with a Toyota Corolla on (*sic*) registration ADW 4685 saying we have delayed paying you your instalments so give us US\$4000 cash and the balance of US\$2000 will go to the instalments for March, 2016.
10. I paid the amount and we made an affidavit towards that. We also made an agreement of sale of the Toyota Corolla and signed it with witnesses.
11. From March 2016 up to June 2016 I did not receive any instalments of the Honda Fit and made efforts to try and recover the motor vehicles but were fruitless (*sic*).
12. In June 2016 the two accused persons approached and said we have found a ready buyer for the Toyota Corolla so we will come back with your cash within 3 hours. As surety that there (*sic*) were coming back they left a Toyota Avensis on (*sic*) registration number ADB 7025 with engine IAZ5061080 and chassis AZT 2550004768.” (emphasis added).

It is evident, from the foregoing, that Phiri and his colleague did not use the vehicle as security. They left a Toyota Avensis with Maguta.

The evidence shows that the Toyota Avensis was later recovered from Maguta as was the Toyota Corolla. Maguta regrettably remained with nothing.

Nothing turns on para(s) 3 to 11 of the annexure. Reduced to their basics, the paragraphs show that:

- (i) in December, 2015 Maguta gave his Honda Fit motor car to Phiri to sell on his behalf for \$6000. He was to be paid over a period of six months at \$1000 per month.

- (ii) on 25 January 2016, Phiri and him entered into another agreement which was similar to that of December 2015 and in respect of another Honda Fit motor vehicle.
- (iii) In February, 2016 Phiri paid him \$2000.
- (iv) In March, 2016 Phiri sold to him the Toyota Corolla as per his Annexure A. The car was selling for \$6000. Phiri requested him to pay \$4000 and allowed him to retain \$2000 as Phiri's instalments for the first Honda Fit which carried a monthly instalment of \$1000 for the months of December 2015, January, February and March, 2016. Phiri, therefore, made a total payment of \$4000 at \$1000 per month for four months.

There was, therefore, no swopping of the cars as Muvango stated. This was a straight contract of purchase and sale of the vehicle. The fact that Phiri chose to act dishonestly with Muvango is neither here nor there. That matter remains an in-house thing between Phiri and his principal Muvango. Maguta cannot be made to suffer for the sins of Muvango's agent.

There was no dispute of fact in the matter. Phiri acted for, and on behalf of, Muvango. It is trite that a contract made by an agent on behalf of his principal with a third party is regarded in law as having been made by the principal himself (See Gordon & Gezz's *South African Law of Insurance*, 3<sup>rd</sup> ed. See also *Roltex (Pvt) Ltd v Delta Beverages (Pvt) Ltd*, HH 661/15). He who acts through another acts himself. Muvango acted through Phiri. He, accordingly, acted himself. He has himself to blame for what befell him following his agent's dishonest conduct.

Maguta proved his case on a balance of probabilities. The application is, therefore, granted as prayed.

*Mapendere and Partners*, applicant's legal practitioner  
*Zuze Law Chambers*, 1<sup>st</sup> respondent's legal practitioners