



**THE HIGH COURT OF SOUTH AFRICA  
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

- (1) REPORTABLE: YES  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

**01 December 2025**

DATE



SIGNATURE

**CASE NO: 2025-091634**

In the matter between:

**CHRYSTYLE PACHOS**

**APPELLANT**

And

**MFANAWOKULUNGA OBERT NTULI**

**RESPONDENT**

---

**JUDGMENT**

---

**RATSHIBVUMO DJP:**

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for the hand-down is deemed to be on 01 December 2025 at 10H00.

[1] Introduction.

The nature of the application before the Magistrate for Mbombela District (the court *a quo*) was the subject of dispute between Appellant and the Respondent, just as it was before this Court. That dispute entailed whether the application was for a declarator to the effect that the Respondent was a lawful owner of the African Grey Parrot (the parrot/the bird), or a simple *rei vindicatio*.<sup>1</sup> A further dispute was whether the court *a quo* was competent to hear an application seeking declaratory relief and whether a *rei vindicatio* could be heard in that court by way of motion proceedings. That dispute continued before this Court in the arguments presented on appeal. In a judgment handed down on 06 March 2025, in a hotly contested application, the court *a quo* ordered the return of the bird to the Respondent. That order, however, does not declare the Respondent the owner, and it makes no mention of *rei vindicatio*. One may ask, “What’s in the name? A rose by any other name would smell as sweet.”<sup>2</sup>

[2] The fact that ownership of this parrot was fiercely contested is manifest not only from the answering affidavit (which was disallowed in that application), but also from the Small Claims Court's ruling, which dealt with the same matter before it was referred to the court *a quo*. The Small Claims Court ruled that “the case raised difficult and complex questions of law and fact that could not be adequately and fairly dealt with before it.”<sup>3</sup>

[3] It cannot be gainsaid that this background informed the phrasing of the Notice of Motion when the Respondent asked in Prayer 1, a declaration that he was the lawful owner of the parrot. Realising that the Magistrate’s Courts lack the

---

<sup>1</sup> See the Notice of Motion before it was amended by the Respondent before the court *a quo* wherein the Respondent applied for an order to be declared a lawful owner and for the return of a bird the ownership of which was equally disputed.

<sup>2</sup> William Shakespeare, *ROMEO AND JULIET*, 1597.

<sup>3</sup> See the Small Claims Court order wherein the proceedings are stopped in terms of section 23(3) of Act No. 61 of 1984 on p. 003-49 on *CASELINES*.

jurisdiction to grant declaratory orders,<sup>4</sup> the Notice of Motion was amended to omit the declaratory part, leaving only the *vindicatio* part. This, however, did not change the fact that ownership was in dispute and that the court would have to determine who the owner was before ordering a return of the bird. Whether this finding is pronounced as a declaration or not is neither here nor there. What matters is the sweetness of the smell of the flower, whatever the name.

[4] Before ordering the return of an African Grey Parrot back to the owner (the Respondent), the court *a quo* said the following in the opening remarks of the judgment:

“The application before the court is for the African Grey Parrot to be returned to the applicant. The court is going to pause here and state that the application is not to determine who the lawful owner of the bird is... That is beyond this court’s jurisdiction. The declaratory order is for another forum, not this court. In determining the application for the return of the bird, the court considers the following:

- (i) the founding papers of the applicant;
- (ii) the respondent’s opposing papers could not be considered due to the fact that the application for condonation of the late filing was dismissed by the court on 12 December 2024; the matter was then set down for hearing, and thereafter, the matter became unopposed...”<sup>5</sup>

[5] The Appellant (Respondent before the court *a quo*) now appeals against that order and/or declaration. The Respondent intensely opposes the appeal.

[6] Grounds of appeal.

The Appellant set out the grounds of appeal in the Notice of Appeal as follows:

- 4.1 The Honourable Magistrate erred in not finding that the Respondent’s amended Notice of Motion stating:

---

<sup>4</sup> Jurisdiction to grant declaratory orders is exclusively conferred on the Superior Courts by section 21(1)(c) of the Superior Court Act, \No. 10 of 2013.

<sup>5</sup> See the court *a quo*’s judgment on p. 003-143 on *Caselines*.

- i. “Ordering the First Respondent [Appellant] to return the African Grey Parrot with microchip number 941000026296090 to the Applicant [Respondent];
- ii. The Applicant is hereby authorised to remove the said African Grey Parrot from the premises of the First Respondent [Appellant], where it is being kept in terms of the final order of this court dated 22 July 2024 or from the possession of any person or entity which may be in possession of the bird;”

is a relief of the reclaim of property by an owner of property, which constitutes the remedy *of rei vindicatio*.

4.2 The Honourable Magistrate erred in not finding that the Respondent's cause of action, being *rei indicatio*, should have been lodged as an action procedure in terms of section 29(1)(a) of the Magistrates’ Court Act No. 32 of 1944 as a creature of statute and not by application proceedings.

4.3 The Honourable Magistrate erred in not finding that the Respondent's application should either have been dismissed or referred to oral evidence.

[7] *Rei vindicatio*: Statutory limitation.

The Magistrate Court derives its authority to adjudicate *rei vindicatio* claims from section 29(1)(a) of the Magistrates’ Court Act, No. 32 of 1944 (the Act), which provides,

**“Jurisdiction in respect of causes of action**

actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the *Gazette*...”

[8] The question as to whether a *rei vindicatio* claim can be brought by way of application proceedings has been settled in our law. In *Mokoena v Minister of Law and Order*,<sup>6</sup> the Full Bench dealt with the interpretation of section 29(1)(a)

---

<sup>6</sup> 1991 (3) SA 187 (T).

of the Act in the context of *rei vindicatio*. Just as *in casu*, the appellant in *Mokoena*, commenced the *rei vindicatio* claim by way of motion proceedings before the Magistrate's Court, which was dismissed on jurisdictional limitations.

[9] Aggrieved by this outcome, the appellant in *Mokoena* appealed against the decision, arguing on appeal that the word 'action' could and should include proceedings which are initiated by way of a notice of motion. He further contended that, because s 29(1)(f) was added by s 1 of Act 56 of 1984 and because s 16(1) of the Matrimonial Property Act<sup>7</sup> provides that applications can be made, therefore if 'action' in paragraph (f) is construed as an 'application', then the word 'action' in s 29(1)(a) includes an application. It was contended that it was not the intention of the Legislature that a *rei vindicatio* cannot be brought on notice of motion and that it intended to 'give the public as large as possible access to all the procedures of the magistrate's court'.<sup>8</sup>

[10] The Court of Appeal in *Mokoena* rejected this submission, saying there was no authority to support it. It reasoned out that Magistrates' Courts have no inherent jurisdiction and that their jurisdiction must be deduced from the four corners of the statute under which they are constituted. This applies not only to the empowering sections of the Act but also to the Rules. A magistrate cannot exercise powers which are not expressly stated in the Act or the Rules. Authority may be implied as well as expressed. When the Act gives jurisdiction to the court on the subject in dispute, its purpose is not to be defeated because the ancillary powers which are necessary to enforce the judgment have not been especially mentioned.<sup>9</sup>

---

<sup>7</sup> No. 88 of 1984.

<sup>8</sup> *Mokoena supra* at 191H-J – 192A.

<sup>9</sup> At p. 192B.

[11] Although the appellant in *Mokoena*, had a compelling case on merits, the appeal was dismissed, as this was a matter which should have been instituted in the Magistrate's Court by way of action, or in any manner, in the Supreme Court.<sup>10</sup>

[12] Upon close reading of the judgment of the court *a quo*, the impression is created that the court was of the view that, once an application is unopposed, the applicant would be entitled to the relief sought, irrespective of jurisdictional limits. This is apparent from the fact that the order sought was granted without any evaluation or consideration of the jurisdictional provisions.

[13] As much as the application seeking relief in excess of monetary jurisdiction, or the cause of action having arisen outside the court's area of jurisdiction, cannot be granted even when unopposed, the court *a quo* erred in not engaging whether it had jurisdiction to hear an application for the return of property, against the express provision of the Act. On this aspect alone, the order granted by the court *a quo* stands to be set aside.

[14] *Rei vindicatio: Ownership.*

The inherent nature of vindictory relief means that the court *a quo*, cannot grant an order for the return of movable property unless satisfied that ownership has been established.

[15] The Appellate Division in *Chetty v Naidoo*<sup>11</sup> made it clear that ownership is not peripheral to *vindicatio*; it is the essence of the remedy. Jansen JA held that the vindictory action is governed primarily by the legal concept of

---

<sup>10</sup> See also *Cloete v Karee-Aar Landgoed* BPK 1997 (3) SA 30 (NC).

<sup>11</sup> [1974] 3 All SA 304 (A) at p. 309-310

ownership.<sup>12</sup> Unless ownership is established, the remedy is simply not available.<sup>13</sup> This foundational principle has never been doubted.<sup>14</sup>

[16] A similar articulation appears in *Gardner v Dampier Development & Others*:<sup>15</sup>

“One of the essential elements of an *actio rei vindicatio* is that a party seeking such relief must establish the right of ownership. The author D Carey Miller in *THE ACQUISITION AND PROTECTION OF OWNERSHIP* (1986) at p. 256 after making the above point goes on to stress that:

"As Voet points out, the action is not available to those who have not yet obtained ownership as for example, a purchaser who has paid the price but not yet obtained delivery. Nor, indeed, is it enough for the plaintiff to gain ownership *pendente lite* because it cannot be competent for a party to institute a vindictory action anticipating the acquisition of ownership".

[17] The Magistrate in this matter expressly stated that she lacked jurisdiction to determine the lawful owner of the bird. This finding should have disposed of the matter. Having disavowed the jurisdiction to determine ownership, the court *a quo* could not thereafter issue an order whose validity depends on that very determination. Form cannot defeat substance. The label affixed to the order does not alter its character, hence the question, “What’s in the name?”<sup>16</sup> A court cannot do indirectly what it cannot do directly.

[18] Condonation for the late filing of the answering affidavit.

---

<sup>12</sup> *Chetty v Naidoo supra* at 309 “The incidence of the burden of proof is a matter of substantive law (*Tregea and Another v. Godart and Another*, 1939 A.D. 16 at p. 32), and in the present type of case it must be governed, primarily, by the legal concept of ownership.”

<sup>13</sup> *Chetty v Naidoo supra* at 309 “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 (cf. *Jeena v. Minister of Lands*, 1955 (2) S.A. 380 (A.D.) at pp. 382E, 383).”

<sup>14</sup> *Thepanyega N O and Others v Letsoalo and Others* (73/2021) [2022] ZASCA 30 (24 March 2022) at para 9 citing *Chetty v Naidoo supra* at p. 310.

<sup>15</sup> [2010] JOL 25750 (ZH) at p. 3

<sup>16</sup> See fn 2 *supra*.

It is apposite for this Court to revisit the court *a quo*'s decision in the application for condonation for the late filing of the answering affidavit. The Respondent's argument before this Court heavily relied on the court *a quo*'s ruling, excluding the answering affidavit. The Respondent's case, which influenced that ruling, was that the Appellant's answering affidavit should not be allowed as it was late, and the reasons given for the lateness were flimsy. Once the condonation was refused, nothing else advanced by the Appellant could be considered by the court. The application was therefore heard unopposed, as no answering affidavit was accepted.

[19] When invited to address the Court on jurisdictional impediments, the Respondent had very little to submit, saying that these should have been raised before the court *a quo* by way of an answering affidavit, and that the Appellant failed to do so. The Respondent could not even address the *Plascon-Evans* rule, despite being requested to do so by this Court. The Respondent's view was that the Appellant failed to oppose the application before the court *a quo* and, for that reason, was barred from raising any aspect for consideration by this Court.

[20] At the time the court considered the condonation application, it already had the answering affidavit before it, as well as the affidavit in support of the condonation, in which the Appellant set out the reasons for the delay in filing it. In the answering affidavit, the Appellant challenged the court *a quo*'s jurisdiction to hear the *rei vindicatio* application. It also raised several factual disputes that could not be determined from the papers. Lastly, the answering affidavit opposed the attempts by the Respondent to have the Notice of Motion amended.

[21] As for the affidavit filed in support of the condonation application, the Appellant highlighted that the delay was mainly due to ongoing negotiations



between the parties, which she hoped would settle the dispute. It also emphasised that the 30-day delay was not significant compared with the main application, which was launched almost three years after the bird was lost and found.

[22] The court *a quo* accepted the reasons advanced by the Appellant as being bona fide. It, however, reasoned that the application should be dismissed because it did not address the degree of lateness and failed to show good cause.<sup>17</sup> The court *a quo* reached this decision despite supposedly relying on the Constitutional Court judgment of *Ferris and Another v Firststrand Bank Limited and Another*,<sup>18</sup> where Moseneke DCJ said,

“In *Bertie Van Zyl*<sup>19</sup> this Court held that lateness is not the only consideration in determining whether condonation may be granted. It held further that the test for condonation is whether it is in the interests of justice to grant it. As the interests-of-justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, an applicant’s prospects of success and the importance of the issue to be determined are relevant factors.” [My emphasis].

[23] Interestingly, the court *a quo* made no finding regarding the interests of justice, to wit, the prospects of success and the importance of the issues raised. Considering what this Court already held in respect of the court *a quo*’s jurisdiction to hear an application for *rei vindicatio* above, and the factual determination in motion proceedings, it cannot be gainsaid that the issues raised in the answering affidavit were important.

[24] The decision to exclude the answering affidavit is irreconcilable with the reasoning of the court *a quo*, which, with approval, quoted from the

<sup>17</sup> See the court *a quo*’s judgment on the condonation application on pp. 003-201 to 003-302 on *Court Online*.

<sup>18</sup> (CCT 52/13) [2013] ZACC 46; 2014 (3) BCLR 321 (CC); 2014 (3) SA 39 (CC) (12 December 2013) at para 10.

<sup>19</sup> [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 14.

Constitutional Court’s judgment the factors to be considered in a condonation. Reference to this judgment appears to have been a mere lip service without applying its principles to the application before it. The fact that the court *a quo* chose not to address those issues in its main judgment, despite them glaring from the answering affidavit that was before it, is illogical.

[25] One cannot think of the prejudice suffered by the Respondent that a costs order could not ameliorate. This was not an application to submit the answering affidavit on a future date, but a condonation for what had already been filed, albeit late. The Respondent still had a chance to reply thereto. It appears the Respondent wanted to avoid responding thereto at all costs. In *Media 24 (Pty) Ltd and Another v Maluleke*,<sup>20</sup> the Full Court of the Limpopo Division of the High Court dealt with an appeal in which the Appellant was aggrieved by the exclusion of its supplementary answering affidavit, the court below holding that it was brought on short notice and on the date of the hearing of the main application. The Full Court held,

“Any prejudice suffered could have been ameliorated by the necessary cost order, if so required, than to forge and exclude the admission of supplementary affidavit, the contents of which were bound to change the course of the application.”<sup>21</sup>

[26] In light of the above, the dismissal of a condonation for late filing of the answering affidavit by the court *a quo* was a misdirection.

[27] The Plascon-Evans rule.

It is trite that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are exceptional, motion proceedings cannot be used to resolve factual disputes because they are not designed to determine

---

<sup>20</sup> (HCA 05/2024) [2025] ZALMPTHC 1 (3 February 2025)

<sup>21</sup> *Media 24, supra*, at para 26

probabilities.<sup>22</sup> There is no doubt that the court *a quo* was aware of the factual disputes inherent in the application, given the ruling by the Small Claims Court referred to in paragraph 2 above and the contents of the answering affidavit it refused to accept. In *National Director of Public Prosecutions v Zuma*,<sup>23</sup> the Supreme Court of Appeal held,

“It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.

[28] The Respondent was fully aware of the disputes that could arise, given the outcome of the Small Claims Court. The Respondent was therefore entitled to a positive result only if the facts averred in his affidavit, which have been admitted by the Appellant, together with the facts alleged by the latter, justified the recourse he sought. Clearly, this was not one of such cases. The disputes in this case made the application stillborn.

[29] The Respondent appears to have utilised every ammunition the law afforded to him in the battle against the Appellant over the prized bird. A seasoned soldier knows that to win the battle, it is not always necessary to fire all the ammunition one can lay his hands on. Sometimes, intelligence that leads to victory can be secured by sparing the enemy's life. That is being strategic in a fight.

[30] If the condonation for the late filing of the answering affidavit had not been opposed, it could have afforded the Respondent a window to convert the application into a trial to resolve the disputes raised in the answering affidavit. Had this been done, he would have crossed the two hurdles currently standing

---

<sup>22</sup> See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) per Harms JA, at para 26.

<sup>23</sup>

in his way: the Lower Court's jurisdiction to hear a *rei vindicatio* application and the challenge posed by the *Plascon-Evans* rule. Given that the Respondent seemed to have made a strong or compelling case on the facts, and presuming that the factual allegations could withstand the scrutiny of a trial, that could have been very strategic. Unfortunately, all the ammunition was utilised, and it is too late to undo.

[31] There is no reason why costs should not follow the outcome. Although the application was finally heard unopposed as a result of the outcome of the condonation application, it is common cause that the Appellant opposed it from its inception. The winner would, as such, be entitled to the costs.

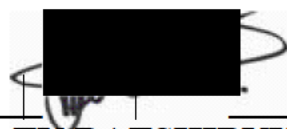
[32] The Order.

For the above reasons, the following order is made:

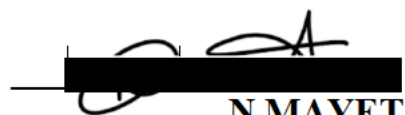
32.1 The appeal is upheld with costs.

32.2 The order of the court *a quo* is set aside and replaced with the following:

The application is dismissed with costs.

  
TV RATSHIBVUMO  
DEPUTY JUDGE PRESIDENT

I agree.

  
N MAYET  
ACTING JUDGE OF THE HIGH COURT

**FOR THE APPELLANT:**

**ADV. LH MAKAMU**

**INSTRUCTED BY:**

**ANDRE DU PLESSIS ATTORNEYS  
MBOMBELA**

**FOR THE RESPONDENT:**

**MR. JH COETZEE**

**INSTRUCTED BY:**

**OBERT NTULI INC.  
MBOMBELA**

**DATE OF HEARING:**

**24 OCTOBER 2025**

**DATE OF JUDGMENT:**

**01 DECEMBER 2025**