THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1199/2019

In the matter between:

JOSE AQUINO MONTEIRO	**FIRST APPELLANT**
AUTOGLEN MOTORS (PTY) LTD	**SECOND APPELLANT**
and	
KENNETH LEONARDO DIEDRICKS	**RESPONDENT**

Neutral citation: *Monteiro and Another v Diedricks* (Case no 1199/19) [2021] ZASCA 015 (2 March 2021)

Coram: DAMBUZA, SCHIPPERS and PLASKET JJA and GOOSEN and MABINDLA-BOQWANA AJJA

Heard: 4 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 2 March 2021.

Summary: *Mandament van spolie* – principle affirmed that remedy possessory in nature – order requiring restoration of possession must be capable of being carried into effect – high court having ordered party not in possession of spoliated property to restore possession thereof to despoiled party – whether agent of company a co-spoliator - order set aside as not capable of being carried into effect.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mtati AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the Gauteng Division of the High Court, Johannesburg is set aside and replaced with the following order:

'The application is dismissed with costs.'

JUDGMENT

Goosen AJA (Dambuza and Plasket JJA concurring)

[1] The central issue in this appeal is whether a court can order a party to restore possession of goods of which it is not in possession. It is a question which has served before our courts in applications for a *mandament van spolie* on numerous occasions. As with most questions regarding the application of legal principles to facts, controversy can arise. In this instance the controversy extends to the proper interpretation of the principles.

[2] Mtati AJ, in the Gauteng Division of the High Court, Johannesburg (the high court), on 12 September 2019, ordered the appellants to restore possession of a BMW motor vehicle to the respondent. Leave to appeal to this Court was granted by the high court.

The facts

[3] The respondent, Mr Kenneth Leonardo Diedricks (Diedricks), was in possession of a BMW motor vehicle and, on 28 August 2019, he delivered the vehicle to the second applicant, Autoglen Motors (Pty) Ltd (Autoglen) for a routine maintenance service. He handed the keys to the vehicle to Roger Quintal (Roger), a consultant employed by Autoglen. At approximately 13h30 he received a telephone call from Roger advising him that he could collect the vehicle. When, later that afternoon, Diedricks went to Autoglen's premises to collect the vehicle he discovered that the keys to the vehicle had been handed over to representatives of an entity that claimed to own it.

[4] It transpired that shortly after Roger had called Diedricks to advise him that he could collect the vehicle two persons, Louis and Diane, had arrived at Autoglen's premises. They spoke to Sergio Quintal (Sergio), and told him that they represented the owner of the vehicle. They showed him eNATIS[1] registration papers which reflected that the vehicle was owned by Street Talk Trading 178 (Pty) Ltd (Street Talk Trading). Sergio was persuaded to hand over the keys to the vehicle but kept possession of the vehicle. When Diedricks went to collect the vehicle, using a spare set of keys, he was informed by Sergio that Autoglen had been instructed by the first appellant, Mr Jose Aquino Monteiro (Monteiro), not to hand over the vehicle to him. It was common cause that Monteiro is a director of Street Talk Trading.

[1] This is the national vehicle registration system established in terms of the National Land Transportation Act 5 of 2009.

[5] Autoglen retained possession of the BMW motor vehicle until 29 August when it handed the vehicle to Street Talk Trading upon payment of the invoice for the service it had performed on the vehicle.

[6] Diedricks launched an urgent spoliation application on 29 August 2019. BMW South Africa (Pty) Ltd (BMW SA) was cited as first respondent, Autoglen as second respondent and Monteiro as third respondent. No relief was sought against BMW SA[2] or Monteiro. Diedricks sought only an order that Autoglen restore possession of the BMW motor vehicle to him. He stated in his founding affidavit that until 28 August 2019 he was in peaceful and undisturbed possession of the BMW motor vehicle. He explained that he was a party to a vindicatory action in which Street Talk Trading claimed repossession of the vehicle on the basis of ownership. That action was pending before the high court. He had given no instruction to nor authorised the release of the motor vehicle to Street Talk Trading or Monteiro. He accordingly alleged that Autoglen had unlawfully dispossessed him of the motor vehicle.

[7] In its answering affidavit Autoglen set out the circumstances, described above, in which it had released the vehicle to Street Talk Trading. Monteiro, in his answering affidavit, confirmed these facts. He confirmed that a vindicatory action was pending before the high court. He alleged however, that since Street Talk Trading was the owner of the vehicle, it was entitled to take possession thereof as it did. He further stated that Street Talk Trading had sold the vehicle, on 29 August, to a Mr Kioilos and had delivered it to him. He, Monteiro, was at no stage in possession of the vehicle. Street Talk Trading

[2] The high court made no order against BMWSA. It is accordingly not before this Court.

was no longer in possession thereof having entered into an agreement of sale with a third party.

Proceedings before the high court

[8] Before the high court, Autoglen and Monteiro based their resistance to the spoliation application on several grounds. Apart from contending that a spoliation order could not be granted against them because they were not able to restore possession, both raised a challenge to the alleged non-compliance with regulations governing the administration of the oath and to the urgency with which the application was pursued.

[9] The high court quite correctly ruled that the respondent had made out a proper case for urgency. This aspect was abandoned. Insofar as the alleged non-compliance with rules regulating the administration of the oath is concerned, Monteiro persisted with this issue on appeal. The high court condoned Diedricks' non-compliance with the regulations. I accept that, for the reasons given by the high court, it was entitled to condone the non-compliance and that it did so properly.

[10] In the notice of motion Diedricks only sought an order against Autoglen. However, such relief was abandoned in his replying affidavit. He sought then, without formal amendment of the notice of motion, an order against Monteiro. The high court granted an order, however, that:

'Possession of a BMW motor vehicle . . . is to be restored to the applicant immediately by the 2nd and / or 3rd respondent. . . .'

The issues

[11] Before this court Monteiro and Autoglen relied upon two primary grounds. The first was that a *mandament van spolie* ought not to have been granted because Diedricks was not, as matter of fact and law, in possession of the motor vehicle when the spoliation occurred. It was submitted that he had, by delivering the vehicle to Autoglen for repairs given up possession thereof. In relation to Autoglen he had consented to its possession. Autoglen could therefore not be said to have spoliated the property. In relation to Monteiro it was submitted that inasmuch as the vehicle was taken into the possession of Street Talk Trading, Diedricks was not deprived of possession since it was then in the possession of Autoglen. On this basis, it was contended that Diedricks did not establish the first requisite for an order restoring possession, namely that he was deprived of possession.

[12] The second point relied upon was that neither Autoglen nor Monteiro were in possession of the motor vehicle. Autoglen had passed possession on to Street Talk Trading and could therefore not restore it to the possession of Diedricks. As for Monteiro, he asserted that the vehicle had been sold by Street Talk to a third party.

[13] For reasons which will become apparent hereunder I propose to deal with the second issue raised by Monteiro and Autoglen since it is, having regard to the facts, entirely dispositive of the appeal.

The principles

[14] The *mandament van spolie* is a possessory remedy which is available to a person whose peaceful possession of a thing has been disturbed. It lies

against the person who committed the dispossession. The *mandament* is not concerned with the underlying rights to claim possession of the property concerned. It seeks only to restore the *status quo ante*. It does so by mandatory order irrespective of the merits of any underlying dispute regarding the rights of the parties.[3] The essential rationale for the remedy is that the rule of law does not countenance resort to self-help.

[15] In *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others (Rikhotso)*[4] it was held that:

'The remedy afforded by the *mandament van spolie*, expressed in the *maxim spoliatus ante omnia restituendus est*, is generally granted where one party to a dispute concerning possession of property seizes the property pursuant to what he believes to be his own entitlement thereto. In such cases a court will summarily order return of the property irrespective of either party's entitlement to possession, and will not entertain argument relating to their respective rights until this has been done. The principle underlying the remedy is that the entitlement to possession must be resolved by the courts, and not by a resort to self-help.

By its nature then a spoliation order will usually operate as no more than a preliminary order for restoration of the *status quo* until the entitlement to possession of the property is determined. The assumption underlying the order is that the property exists and may be awarded in due course to the party who establishes an entitlement thereto.'

[16] This doctrinal basis of the remedy has been approved both by this Court in *Tshwelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*[5] and the Constitutional Court in

[3] *Van Rhyn and Others NNO v Fleurbaix Farm (Pty) Ltd* 2013 (5) SA 54 (WCC) para 7.
[4] *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997 (1) SA (W) at 532G-I.
[5] *Tshwelopele Non-Profit Organization and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) para 24.

Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality.[6]

[17] Two requirements must be met in order to obtain the remedy. Firstly the party seeking the remedy must, at the time of the dispossession, have been in possession of the property. The second is that the dispossessor must have wrongfully deprived them of possession without their consent. As indicated in *Rikhotso* the assumption underlying the granting of the remedy is that the property exists and is capable of being restored to the possession of the party that establishes entitlement thereto. It is for this reason that the remedy is not available in circumstances where it has been destroyed. It is also not available, generally, in circumstances where the property is no longer in the possession of the spoliator.

[18] Our courts have accepted that in certain circumstances a remedy may nevertheless be granted where the property concerned has been destroyed. These circumstances are not relevant to the present matter. They relate, as indicated in *Tshwelopele* and *Schubart Park* to instances where the dispossession also implicates constitutionally protected rights such as the right to housing and shelter. Importantly, it was held in *Tshwelopele* that there is no need to develop the remedy's essential possessory character or to graft onto it a constitutional element. In that matter, as in *Schubart Park*, the remedy was based upon the court exercising its constitutional jurisdiction to grant an appropriate remedy distinct from the essential *mandament*.

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[6] *Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality (Socio-Economic Rights Institute of South Africa as amicus curiae)* 2013 (1) SA 323 (CC) para 24.

[19] Our courts have also accepted that the remedy may be granted in circumstances in which the property is no longer in the possession of the spoliator, but is held by a third party. In *Malan v Dippenaar*[7] it was held:

'Na my mening is 'n Hof geregtig om 'n bevel te maak teen 'n spoliator vir teruglewering van die besit van gespolieerde eiendom al is hy nie meer in besit daarvan nie tensy, om een of ander rede—bewys waarvan op die spoliator is—dit duidelik is dat dit onmoontlik vir hom sal wees om die Hof se bevel uit te voer.'[8]

[20] There is, however, a contrary view to the effect that the mandament does not lie in circumstances where possession of the property has passed into the possession of a bona fide third party.[9] In *Jamieson and Another v Loderf (Pty) Ltd and Others*[10] Rogers J outlined and considered the nature of this controversy in the authorities. The court came to the conclusion that it was unnecessary to resolve it. Instead it held, on the facts, that the immovable property in issue in that matter had been sold and transferred to the third party who had no knowledge of the pending spoliation proceedings and had purchased the property bona fide. Accordingly as a matter of fact restoration of the property was not possible. For this reason an order restoring the property could not be granted. The court nevertheless framed a declaratory remedy to vindicate the underlying principle of the rule of law. It did so primarily because the property had been sold after an unsuccessful application for a *mandament* but while an appeal was pending, in which the court of first instance was found to have been wrong.

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[7] *Malan v Dippenaar* 1969 (2) SA 59 (O) at 65G-66A; see also *Painter v Strauss* 1951 (3) SA 307 (O); *Sityata v Eastern Cape Development Corporation* [2018] ZAECMHC 34.

[8] 'In my view a Court would be entitled to make an order against a spoliator for the return of possession of spoliated property even if he is no longer in possession thereof unless, for one or other reason – proof thereof being on the spoliator – it is clear that it will be impossible for him to carry out the Court's order'.

[9] *Burnham v Neumeyer* 1917 TPD 630 at 633; *Jivan v National Housing Commission* 1977 (3) SA 890 (W) at 894A – 896G.

[10] *Jamieson and Another v Loderf (Pty) Ltd and Another* [2015] ZAWCHC 18.

[21] In this matter I am similarly of the view that it is unnecessary to enter upon the terrain of the academic controversy regarding the availability, in principle, of the remedy where the spoliator is no longer in possession of the spoliated property. That is so because the *mandament* by its nature may involve either mandatory elements, such as the delivery of movable property, or prohibitory elements, as in the case where a party is restrained from preventing certain steps being taken to restore possession.[11] Where the order cannot be carried into effect it cannot, competently, be granted. Whether the order can be carried into effect is a question of fact to be determined by the court asked to grant an order.

[22] In *Administrator, Cape and Another v Ntshwaqela* [12] the court said of this essential consideration,

'It is trite that a court will not engage in the futile exercise of making an order which cannot be carried out. So, an order for specific performance of a contract will be refused where performance is impossible; and an order *ad factum praestandum* will similarly be refused in such circumstance (e.g. an order for maintenance where the defendant is destitute). The principle is embodied in the maxim *lex non cogit ad impossibilia*, which is discussed in Broome's *Legal Maxims*, 10th ed. at 162:

"This maxim, or, as it is also expressed, *impotentia excusat legem*, must be understood in this qualified sense, that *impotentia* excuses when there is a necessary or invincible disability to perform the mandatory part of the law, or to forbear the prohibitory. It is akin to the maxim of the Roman law, *nemo tenetur ad impossibilia*, which, derived from common sense and natural equity, has been adopted and applied by the law of England under various and dissimilar circumstances.

[11] See *Administrator, Cape and Another v Ntshwaqela* 1990 (1) SA 705 (A) at 720; [1990] 2 All S 34 (A)
[12] Ibid at 720.

The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases."

The same principle must apply where the question is one not of obeying the law but of complying with an order of court.

In the context of the mandament van spolie, impossibility is a question of fact, and where it is contended that an order should not be granted because it cannot be complied with, it must be shown that compliance is impossible on the facts.'

[23] In *Eke v Parsons*[13] the Constitutional Court affirmed the essential characteristics of a court order. It accepted that a court order must be effective, enforceable and immediately capable of execution. In a minority concurring judgment Jafta J stated that:

'The rule of law requires not only that a court order be couched in clear terms but also that its purpose be readily ascertainable from the language of the order. This is because disobedience of a court order constitutes a violation of the Constitution.'

[24] It bears emphasis that in order to be an effective order, whether or not its language is clear, the order must be capable of being carried into effect by the party under burden of that order.

Assessment

[25] The facts in this matter are those which, on the principle set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[14] are set out in the

[13] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) para 12.
[14] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

answering affidavits filed by Monteiro and Autoglen. It must be accepted therefore that Monteiro, acting in his capacity as a director of Street Talk Trading, caused it to take possession of the motor vehicle from Autoglen. What occurred immediately thereafter, indeed on the day that the spoliation application was launched, is set out in Monteiro's affidavit as follows:

'Street Talk had no use for the motor vehicle and for this reason it sold the motor vehicle to Mr Kioilos on 29 August 2019. The agreement in terms of which the motor vehicle was sold was concluded orally. I represented Street Talk and Mr Kioilos acted personally. Pursuant to the sale of the motor vehicle to Mr Kioilos, Street Talk delivered the motor vehicle to Mr Kioilos who is in possession thereof.'

[26] It is apparent from these facts that, to the extent that Monteiro exercised possession over the motor vehicle, he did so on behalf of Street Talk Trading. It is also apparent that Street Talk Trading, a separate legal persona, sold the motor vehicle and perfected the sale by delivery of the merx to the third party purchaser.

[27] The order that was granted by the high court required Autoglen and / or Monteiro to restore possession of the motor vehicle to Diedricks. In the light of these facts it is difficult to conceive how Autoglen and Monteiro could give effect to the order. Neither was in possession of the motor vehicle. Autoglen could not be expected to intervene in a contractual relationship to which it was not a party. No doubt, for this reason Diedricks did not move for an order against Autoglen. Nevertheless, an order was made against it by the high court.

[28] Just as Autoglen could not, in law or fact, give effect to the order made, so too was Monteiro not capable of giving effect to the order. Certainly, Monteiro could not be compelled to take steps to restore possession without Street Talk Trading, the entity which took possession of the motor vehicle and disposed of it to a third party, being compelled, by a court order, to forbear such steps or to take them itself. Street Talk Trading was not joined in the proceedings. This is inexplicable given the facts disclosed in the affidavit filed by Monteiro and also in the light of the fact there was pending litigation between Street Talk Trading and Diedricks, in which ownership of the motor vehicle was at issue. Had Street Talk Trading and Kioilos, the third party, been properly joined, even after the answering affidavits were filed in the application, Diedricks may well have been able to obtain proper relief.

[29] It follows, that upon a proper appreciation of the facts of the matter, an order requiring Monteiro to restore possession of the motor vehicle to Diedricks was not an order with which compliance was possible.

[30] It was suggested in argument that Monteiro did not assert that it was impossible to comply with the order. It was also submitted that since the onus is borne by the party asserting such impossibility more was required than the 'mere' assertion that the vehicle had been sold. In this regard it was suggested that such 'mere' assertion would defeat a party's entitlement to the restoration of possession and would undermine the administration of justice. In developing the argument, counsel suggested that Monteiro ought to have provided greater detail regarding the sale of the motor vehicle so that the court would be able to assess whether it was a *bona fide* sale. Counsel was, however,

unable to point to any particular allegation regarding the sale which would alter the essential fact, namely that the sale had been perfected.

[31] The argument regarding the 'mere' assertion of disposal of the vehicle loses sight of how an onus or evidentiary burden is discharged. The burden is discharged upon application of a single standard and upon the facts as are found to be established. In this instance those facts are that the vehicle was sold and delivered to a third party. They do not permit of a finding that an order for restoration could properly be made against Monteiro. The failure to allege that compliance with a restoration order is impossible would not add to the weight in favour of such conclusion. In each instance the court deciding whether to grant a *mandament van spolie* against a particular respondent must make its decision upon the facts and, as it must necessarily do when making an order, alert to whether the order it makes can be carried into effect.

[32] Counsel for Diedricks argued that the rapid sale of the motor vehicle suggested that Monteiro and Kioilos had 'colluded' in some manner to frustrate Diedricks' claim to possession of the motor vehicle. There is however, no evidence to support this. The conclusion, to which the high court came, is based upon an inference. It is however, not the only one which can reasonably be drawn. Even if it were to be accepted that Monteiro conducted himself in a manner which was deliberately calculated to deprive Diedricks of possession of the vehicle and to frustrate his defence to the pending vindicatory action, it is not possible to conclude that Kioilos was a party to such scheme. The fact that Monteiro's conduct may be reprehensible does not render the order an effective order.

[33] For the reasons already indicated, the order against both Autoglen and Monteiro is not one that competently could be made. The appeal must therefore succeed.

Costs

[34] As already indicated the high court ought not to have granted an order against Autoglen in circumstances where such relief was abandoned at the hearing of the application. Autoglen was obliged to come to this court on appeal to set that order and the associated costs order aside. It was open to Diedricks to abandon the orders obtained against Autoglen. He did not. In these circumstances Autoglen is entitled to its costs on appeal on the ordinary principle that it was successful. It is also entitled to its costs in the high court.

[35] The same is true of Monteiro notwithstanding that he, as the agent of Street Talk Trading, conducted himself in manner that suggests a deliberate resort to self-help. For reasons I have already mentioned relief was sought against the wrong party. The order by the high court ought not to have been granted. For as long as that order subsisted and had not been abandoned, Monteiro was obliged to approach this Court. He is accordingly entitled to his costs on appeal. He is also entitled to his costs in the high court for the reasons already mentioned. I do not consider that it will be appropriate to issue a declaratory order such as was done in the *Loderf* matter, given the particular circumstances of that case. Similar circumstances do not apply in this case.

[36] In the result, I make the following order:

1 The appeal succeeds, with costs.

2 The order of the high court is set aside and is replaced with the following order:

'The application is dismissed with costs.'

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G. GOOSEN

ACTING JUDGE OF APPEAL

Schippers JA (Mabindla-Boqwana AJA concurring):

[37] I am grateful to my colleague, Goosen AJA, for his statement of the circumstances in which the claim in this case arose and for setting out the issues debated before us. I agree that an order should not have been granted against the second appellant, Autoglen, since Diedricks had abandoned the spoliation order sought against it. However, he persisted with his claim for costs, as the actions by both Autoglen and Monteiro resulted in Diedricks being dispossessed of the vehicle. In my view he is entitled to part of his costs of suit in the high court.

[38] Unfortunately, however, I find myself in disagreement with Goosen AJA on the outcome of the appeal in relation to the first appellant, Monteiro. In my judgment, on the particular facts of the case, the high court was correct to hold that Monteiro had unlawfully despoiled Diedricks of his possession of the vehicle, and to grant a spoliation order.

[39] To explain my reasons for differing from the majority, it is necessary to state the basic facts, which in my opinion clearly show that Monteiro engineered the dispossession of the vehicle. They are largely common ground.

Monteiro is a director of Street Talk Trading, the registered owner of the vehicle. The latter has instituted a vindicatory action against Diedricks in the high court under case number 42871/2018, for delivery of the vehicle (the vindicatory action). That action is defended and when the spoliation application was launched, had reached the stage where the parties were required to deliver their heads of argument.

[40] On the morning of 28 August 2019 Diedricks delivered the vehicle to Autoglen for a service. It was not the first time that Diedricks had taken the vehicle to Autoglen for a service or repairs. He had done so in April 2019, without incident. Autoglen sent an automated message via SMS to the contact person on its system, ie Monteiro, confirming delivery of the vehicle. Monteiro would otherwise not have known that the vehicle was at the premises of Autoglen. Monteiro then advised Mr Sergio Quintal (Sergio), Autoglen's Service Manager that the vehicle should not be handed to Diedricks, but to Street Talk Trading.

[41] Around 15h00 on 28 August 2019, Diedricks telephoned Autoglen to arrange transport in order to collect the vehicle. He was referred to Sergio who informed him that Monteiro had instructed him to give the key of the vehicle to one, Louis, which he did. A short while later Diedricks took the spare key and the court documents relating to the vindicatory action, and went to collect the vehicle from Autoglen. He showed those documents to Sergio and said that he was in lawful possession of the vehicle. In addition, Diedricks' attorney telephoned Sergio and sent him further documents. Sergio however informed Diedricks that Monteiro had given instructions that the vehicle must not be delivered to him, and he refused to deliver it to Diedricks.

[42] Consequently, on the same day, ie 28 August 2019, Diedricks' attorneys wrote to Martins Weir-Smith, the attorneys acting for Monteiro, and to Sergio, advising them of the vindicatory action, and stating that if Diedricks was not placed in possession of the vehicle, the court would be approached urgently for relief. It is not disputed that Monteiro had informed Sergio that the vehicle was not to be released to Diedricks under any circumstances, and that Monteiro would pay any costs incurred by Autoglen. The vehicle was handed to Monteiro at about 11h00 on 29 August 2019, although it was driven away from the premises of Autoglen by someone else. On the same day that the application was launched, Monteiro says that that Street Talk Trading sold the vehicle.

The relief against the first appellant

[43] In order to obtain a spoliation order, an applicant must show that he was in peaceful and undisturbed possession of a thing; and that he was unlawfully deprived of such possession.[15] These two requirements must be proved on a balance of probabilities: a prima facie case will not suffice, since the *mandament van spolie* is a final court order.[16]

[44] It is necessary firstly, to consider the argument by counsel for Monteiro that, at the time of the spoliation, Diedricks was not in peaceful and undisturbed possession, because he had handed over control of the vehicle to Autoglen. Diedricks, so it was argued, also gave up the intention to possess

[15] WA Joubert and J A Faris *The Law of South Africa* 2 ed (2014) vol 27 at 113 para 74.
[16] P J Badenhorst, J M Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006). at 292.

the vehicle when he delivered it to Autoglen. This argument has no merit and can be disposed of shortly.

[45] It is trite that possession comprises an objective or physical element (*corpus, detentio*) and a subjective or mental element (*animus*).[17] The objective element consists in effective physical control or custody of the thing in a person's possession. The measure of control required is a question of degree that differs with the circumstances of each case. In this regard, one of the factors taken into account is whether acquisition or retention of possession is being considered.[18] Once possession has been required initially, continuous physical contact with or control over the thing, is not required for the retention of such possession.[19]

[46] As to the mental element, the person must have the will to possess (*animus possidendi*), which includes (a) an awareness that physical control is being exercised over the thing; (b) the direction of the possessor's will towards exercising control over the thing for himself; and (c) the peculiar *animus* required in view of the function served by possession in the particular case.[20] As regards (c), where the possessor wishes to protect his possession, the will to have the thing for oneself is required.[21]

[47] In *Yeko v Qana*,[22] Van Blerk JA said:

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[17] *Lawsa* fn 15 at 81 para 74.
[18] *Lawsa* fn 15 at 81 para 75.
[19] *Lawsa* fn 15 at 84 para 78.
[20] *Lawsa* fn 15 at 85 para 80.
[21] *Rubin v Botha* 1911 AD 568 at 579; *Groenewald v Van Der Merwe* 1917 AD 233 at 240; *Lawsa* fn 15 at 86 para 80.
[22] *Yeko v Qana* 1973 (4) SA 735 (A) at 739D-E.

'The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself.'

[48] Following this decision, in *Bennett Pringle (Pty) Ltd v Adelaide Municipality*,[23] Addelson J stated:

'If one has regard to the purpose of this possessory remedy, namely to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is (a) making physical use of property to the extent that he derives a benefit from such use; (b) intends by such use to secure that benefit to himself; and (c) is deprived of such use and benefit by a third person.'

[49] Applied to the present case, Diedricks plainly was in possession of the vehicle, both when it was delivered to and while it remained with Autoglen for a service. He had used the vehicle and held it with the intention of securing that benefit for himself. In the founding affidavit Diedricks says that the vehicle is his primary means of transport for personal and business use. He was still capable of exercising physical control over the vehicle after its delivery to Autoglen. Indeed, the defence of the vindicatory action is a powerful indicator that Diedricks had no intention of forfeiting the benefits derived from his possession of the vehicle.

[50] As indicated above, the measure of control required for possession depends on whether the acquisition or retention of possession is in issue. In in the former case, more stringent control is required; and in the latter,

[23] *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E) at 233.

continuous physical contact with the thing is not necessary.[24] As stated in *Bennett Pringle*,[25] *detentio* will be held to exist despite the fact that the claimant may not possess the whole property, or possess it continuously. Thus, in *Lawsa*, the example is given of a person who has left his coat in the foyer of a dance-hall (normally handed to another for safekeeping). While he is dancing, he retains possession of the coat.[26] Likewise, persons who leave their cars to be guarded by an attendant in a parking lot, and those who leave their cars at a carwash, do not lose possession of their cars, although they are unable for a period of time to exercise physical control over the cars. There is no difference in logic or principle between these examples and the facts of this case. Once possession is acquired it will be retained, as long as the possessor is capable of exercising physical control over the thing.[27]

[51] The contrary approach in *Bank van die Oranje Vrystaat v Rossouw*,[28] in which it was said that the respondent gave up possession of a vehicle when he delivered it to a panel beater for repairs, is in my view, incorrect. The judge in that case seems to acknowledge that the approach is inconsistent with *Yeko v Qana* and *Bennett Pringle*.[29] Aside from this, it is not clear whether the respondent lost possession upon delivery of the vehicle, or as a result of the panel beater's exercise of its right of retention. The judge said:

'Dit sal onthou word dat hy [die bank] die voertuig uit die besit van van 'n derde verkry het nadat hy hom betaal het om sy retensiereg af te los. Na my mening was die verweerder

[24] *Lawsa* fn 15 at 84 para 78.
[25] *Bennet Pringle* fn 24 at 233.
[26] Ibid.
[27] *Lawsa* fn 15 at 84 para 78.
[28] *Bank van die Orange Vrystaat v Rossouw* 1984 (2) SA 644 (C) at 648C.
[29] *Bank van die Orange Vrystaat* fn 28 at 648H.

op daardie stadium nie in besit van die voertuig nie. Met ander woorde, die nodige *detentio* het by die verweerder ontbreek.'[30]

[52] It follows that when Diedricks delivered the vehicle to Autoglen, he did not relinquish possession of it. Otherwise viewed, the *mandament van spolie* – rooted in the rule of law, whose main purpose is to preserve public order by preventing persons from taking the law into their own hands[31] – is unavailable to the party unlawfully deprived of possession in circumstances such as the present, and those described in paragraph 50 above.

[53] This brings me to the second issue: whether the high court was correct to grant a spoliation order. The majority judgment states that Monteiro, 'as the agent of Street Talk Trading, conducted himself in a manner that suggests a deliberate resort to self-help'. That Monteiro deliberately resorted to self-help is, on his own version, in my view beyond question. He played a pivotal role in the dispossession. Without Monteiro's active intervention, Diedricks could not and would not have been dispossessed of the vehicle.[32] A person who has ordered or ratified an act of spoliation is also deemed a spoliator.[33] What the facts show, in my respectful opinion, is that Monteiro did not exercise possession or control over the motor vehicle on behalf of Street Talk Trading. But even if he had, it would not assist him, for two reasons. The first is that throughout, Monteiro was a co-spoliator and the claim that he acted in

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[30] *Bank van die Orange Vrystaat* fn 28 at 648C. Emphasis added. My translation:
'It will be recalled that it [the bank] obtained the vehicle from the possession of a third party after it had paid the third party to relinquish its right of retention. In my opinion, the defendant *at that stage was not in possession* of the vehicle. In other words, the necessary *detentio* on the part of the defendant was lacking.'
[31] *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) para 22; *Ngqukumba v Minister of Safety and Security and Others* [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) paras 10-12.
[32] *Adminstrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 718G-719A.
[33] See *Lawsa* fn 15 at 113 para 107 and the authorities there collected.

a representative capacity is immaterial, in my view. So too, the fact that Diedricks must have known of Street Talk Trading's claim of ownership. The second is that a better title to possession of a thing – Street Talk Trading's ownership of the vehicle – is not a defence to the *mandament van spolie*.[34]

[54] In *Administrator Cape v Ntshwaqela*,[35] the applicants, who had been unlawfully dispossessed of their sites on a farm in Noordhoek in the Western Cape, obtained a *mandament van spolie* against the former Cape Provincial Administration (CPA), the South African Police (SAP) and the owners of the farm. It was argued that the role of the CPA was essentially to provide transport for the removal of the applicants and that of the SAP, to maintain order and to prosecute should that prove necessary. Rejecting this argument, Nicholas AJA said:

'There can be no doubt that the CPA and the SAP were co-spoliators with the respective owners. . . . Mr *Comrie,* who appeared for the second and third respondents in this Court, said that although the CPA was vitally involved in the pre-planning, its role was essentially that of providing transport for the removal of the squatters from Dassenberg Farm and The Tip to Khayelitsha. It played no part in the demolition of structures or bulldozing activities or anything else. This is no doubt correct, but the part played by the CPA was nevertheless a vitally important one: without its assistance and support there could have been no removal of the squatters. Mr Comrie said that the role of the SAP was essentially to maintain order and prosecute if that should prove necessary; the police were not involved in the demolition of any structures. I do not think that this is a correct assessment of the part played by the police. They provided the driving force for the operation.'[36]

[55] Nicholas AJA went on to say:

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[34] *Lawsa* fn 15 at 124 para 111.
[35] *Ntshwaqela* fn 32.
[36] *Ntshwaqela* fn 32 at 718C-F.

'There is a dearth of authority on the question of the liability of co-spoliators. In his unpublished doctoral thesis, *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (1986), Prof D G Kleyn says the following at 253:

"7,2.2.7 *Teen wie mandament aangevra word*

Die mandament is in die eerste plek teen die spoliator self gerig. Voorts kan diegene wat opdrag gegee het tot 'n daad van spolie (prinsipaal), asook diegene wat dit ratifiseer (*rationem habere*) aangespreek word. Die rede vir laasgenoemde persone se aanspreeklikheid is volgens Zoesius "*quia ratihabitio in delictis mandato comparatur*". Die gedagte is dus dat die ratifiseerder as 'n prinsipaal en derhalwe as 'n *socius delicti*, beskou word. *Waar die spoliator wat in opdrag gehandel het aangespreek word, word geen tussenkoms van die prinsipaal toegelaat nie* aangesien spolie 'n "*species delicti*" is. Die vraag of beide die prinsipaal en die lashebber en of net een van die twee aangespreek kan word, word ontbeantwoord gelaat deur genoemde skrywers." In support of these statements, the learned author refers to *Christaneus*, *Schrassert*, *Zoesius* and *Nassau la Leck*. Although Prof Kleyn does not specifically discuss the liability of co-spoliators, *the principle is clear and there can be no doubt that they are liable as joint wrongdoers*.'[37]

[56] Applied to the facts of this case, Monteiro was *the* spoliator. He was the driving force behind the removal of the vehicle. He ordered and executed the act of spoliation from start to finish. Upon being informed that the vehicle was at the premises of Autoglen, Monteiro decided to take possession of the vehicle unlawfully, and instructed Sergio not to release it to Diedricks under any circumstances. When Sergio refused to release the vehicle on 28 August 2019, it was Monteiro who went to the premises of Autoglen and convinced

[37] *Ntshwaqela* fn 32 at 718H-719A. Emphasis added. My translation:
'7.2.2.7 *Against whom the mandament may be sought*
The mandament is in the first place directed at the spoliator himself/herself. Moreover, those who gave an instruction for an act of spoliation (principal), as well as those who ratify if (*rationem habere*) can be held liable. The reason for the liability of the latter persons is according to Zoesius, "quia ratihabitio in delictis mandato comparatur". The idea is thus that the person who ratifies is regarded as a principal and therefore as a *socius delicti*. Where the spoliator who has acted on instruction is sought to be held liable, the interposition of the principal is not permitted because spoliation is a "species delicti." The question whether the principal and the agent or only one of the two can be held liable, is left unanswered by the said writers.'

the dealer principal to release it, against payment of Autoglen's invoice. The vehicle was released to Monteiro on condition that he (not Street Talk Trading) would deal with any issues which could arise from its release.

[57] The sole reason for his instruction that Diedricks should not be placed in possession of the vehicle, in Monteiro's own words, was this:

'Since *Street Talk is the owner of the vehicle,* it was perfectly entitled to take possession of the motor vehicle as it did. *For this reason, I advised the second respondent's representative* Mr Sergio Quintal *that the motor vehicle should be handed to Street Talk and not the applicant.*'[38]

[58] Plainly, it was Monteiro who took this decision. On his own showing, he was intent on unlawfully despoiling Diedricks of possession of the vehicle, well-knowing that ownership thereof was the subject of the vindicatory action. Street Talk Trading, the registered owner of the vehicle, instituted that action. It did so – it must be accepted – precisely because it could not take the law into its own hands. In these circumstances, it is inconceivable that Monteiro could honestly have believed that he, or Street Talk Trading, was entitled to take possession of the vehicle. This is the clearest indication that Monteiro's conduct was mala fide.

[59] Apart from this, the fact that Street Talk Trading is the registered owner of the vehicle, or that it produced proof of its ownership to Autoglen, is not a permissible defence in spoliation proceedings: possession of the spoliatus must first be restored before the merits of the case can be considered.[39] The

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[38] Emphasis added.

[39] *Nino Bonino v De Lange* 1906 TS 120 at 122; *Nienaber v Stuckey* 1946 AD 1049 at 1053; *Lawsa* fn 15 at 124 para 111.

essence of spoliation proceedings is the restoration of possession before anything else is decided (*spoliatus ante omnia restituendus est*).[40]

[60] The next question is whether restoration is impossible. In principle, the *mandament* should apply in all cases where a person dispossesses another even without acquiring possession himself, when in so doing he has taken the law into his own hands, and when he is afterwards capable of restoring the status quo ante.[41] The authors of Silberberg and Schoeman's *The Law of Property*, rightly in my view, state that transfer of possession to a third party cannot imply that restoration will always *per se* be impossible.[42] Where a third party has acquired possession a spoliation order can still be granted, unless the spoliator proves that it is impossible for him to give effect to the order.[43]

[61] In *Administrator Cape v Ntshwaqela* Nicholas AJA said:[44]

'In the context of the mandament van spolie, impossibility is a question of fact, and where it is contended that an order should not be granted because it cannot be complied with, it must be shown that compliance is impossible on the facts.'

[62] Monteiro simply failed to show that it was impossible for him to comply with the spoliation order. The explanation for his alleged inability to restore possession, comprises the most perfunctory assertions. He said:

'Street Talk had no use for the motor vehicle and for this reason it sold the motor vehicle to a Mr Kioilos on 29 August 2019. The agreement in terms of which the motor vehicle was sold to Mr Kioilos was concluded orally. I represented Street Talk and Mr Kioilos

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[40] *Tswelopele* fn 31 para 21; *Ngqukumba* fn 31 para 10.
[41] *Lawsa* fn 15 at 120 para 110.
[42] *Silberberg and Schoeman's The Law of Property* fn 16 at 305.
[43] *Painter v Strauss* 1951 (3) SA 307 (O) at 318B-D; *Malan v Dippenaar* 1969 (2) SA 59 (O) at 65H-66C; *Silberberg and Schoeman's The Law of Property* fn 16 at 305.
[44] *Ntshwaqela* fn 32 at 720G-H.

acted personally. Pursuant to the sale of the motor vehicle to Mr Kioilos, Street Talk delivered the motor vehicle to Mr Kioilos who is in possession thereof.'

[63] To begin with, apart from Monteiro's say-so, there is no evidence of the sale of the vehicle to the third party on 29 August 2019. Unsurprisingly, no affidavit by Mr Kioilos confirming the so-called sale has been filed. Monteiro gives no indication of the purchase price, whether the vehicle was sold for cash or on terms, whether the purchase price has been paid, or whether the proceeds of the alleged sale have been paid to Street Talk Trading. And the whereabouts of the vehicle were masked with the simple statement that Mr Kioilos 'is in possession thereof'.

[64] Now, if the courts were to countenance such a 'defence', in my view every application for a spoliation order would be dismissed by the sleight of an allegation that the thing has been sold in terms of an oral agreement, and is in the possession of a third party. Little wonder then, that Mtati AJ, correctly, came to the following conclusion:

'Under the circumstances, I am not persuaded that the action of the second respondent [Autoglen] to release the vehicle was to err on the side of caution, nor am I persuaded that the reasons proffered by the third respondent [Monteiro] of being no longer in possession of the motor vehicle was as a result of a sale to an innocent party and that same was *bona fide*.'

[65] Further, it will be recalled that in the afternoon of 28 August 2019, Monteiro's attorneys had been informed that a spoliation application would be brought. The papers in that application were issued the next day and served on his attorneys by e-mail, the very day on which Monteiro says he sold the vehicle. The time at which the papers were served does not appear from the

record. Monteiro does not say precisely when on 29 August 2019, the sale was concluded. This too, is not surprising. What is clear, however, is that the vehicle could not have been delivered to a buyer before 11h00 on 29 August 2019 – when it was handed to Monteiro by Autoglen. And there is nothing in the answering affidavit to suggest that Mr Kioilis is an innocent third party. But even on the assumption that he is, Monteiro did not allege that it was impossible for him to restore possession of the vehicle; neither did he adduce any evidence of steps he had taken to do so.[45] The high watermark of his case on this score was that the application had to fail, simply because he was not in possession of the vehicle.

[66] What is more, Monteiro himself said that Street Talk Trading 'had no use for the motor vehicle', which he knew or ought to have known when he instructed Sergio not to hand it to Diedricks. Why then was it necessary for Monteiro to give this instruction and remove the vehicle from the premises of Autoglen in the first place, if not to unlawfully deprive Diedricks of possession of the vehicle, and subvert the vindicatory action? This, after he was given notice of the intended spoliation proceedings. The most plausible and readily apparent inference to be drawn from the above facts,[46] is that throughout, Monteiro acted mala fide, with the intention of despoiling Diedricks of possession and undermining the vindicatory action.

[67] For these reasons, the high court's finding that Monteiro unlawfully dispossessed Diedricks of the vehicle, and that he took an easier route by taking the law into his own hands so as to avoid the vindicatory action, cannot

[45] *Ntshwaqela* fn 32 at 720G-H.
[46] *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159D, affirmed in *Kruger v National Director of Public Prosecutions* [2019] ZACC 13; 2019 (6) BCLR 703 (CC) para 79.

be faulted. Monteiro's version that a spoliation order should not have been granted because he was no longer in possession of the vehicle, or because the order could not be complied with as restoration was impossible, does not raise a genuine dispute of fact. That version is so clearly untenable that the high court rightly rejected it merely on the papers.[47] This approach is permitted because motion proceedings are quicker and cheaper and it is in the interests of justice that unvirtuous respondents should not be allowed to hide behind patently implausible versions on affidavit.[48] For this reason, the robust practice of rejecting a plainly untenable version on the papers alone, referred to in *Fakie*,[49] is not out of place in spoliation proceedings.

[68] As has been shown above, the high court was correct to grant an urgent spoliation order against Monteiro, in light of his patently untenable version and the circumstances at the time that the application was launched and when judgment was delivered. However, more than a year has passed since the granting of that order. There is no evidence as to the present whereabouts of the vehicle or who has possession or ownership of it. Does the possibility, in the particular circumstances of this case, that an order to restore possession of the vehicle may not be able to be carried into effect leave Diedricks without a remedy? In my view, not, particularly because it was Monteiro who by his conduct, made it impossible for Diedricks to obtain full relief.[50]

[69] For these reasons, I consider that a declaratory order that Diedricks was unlawfully dispossessed of the vehicle, together with an order for costs in the

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[47] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.
[48] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paras 55-56.
[49] *Fakie* fn 48 para 56.
[50] *Jamieson and Another v Loderf (Pty) Ltd and Others* [2015] ZAWCHC 18 para 59.

high court, is appropriate.[51] This, it seems to me, is a matter of principle: the essential aim of the *mandament van spolie*, which is deeply rooted in the rule of law, is the preservation of the legal order, by preventing individuals from taking the law into their own hands to enforce their rights. Its purpose is to vindicate the rule of law.[52] As Prof Kleyn has observed, the Constitutional Court's decision in *Ngqukumba* 'underscores and heralds a re-look at the interpretation and application of South African common law provisions within the new supreme constitutional context'.[53]

The relief against the second appellant

[70] Autoglen opposed the spoliation application on the same grounds as the first appellant. It claimed that Diedricks was not entitled to any relief at all; that he was not in possession or control of the vehicle at the time of the dispossession; and that it was unable to return the vehicle to Diedricks 'due to the documentation handed to [Sergio] on behalf of the third respondent [Monteiro]'. As stated earlier, Autoglen handed the vehicle to Monteiro on 29 August 2019 after he had convinced the dealer principal to do so and undertook to deal with any consequential issues. It did so on the impermissible basis that Diedricks was not the owner of the vehicle. As already stated, a court does not consider title, or the merits of the case, in a spoliation application.

[71] It is common ground that when the spoliation application was launched, Diedricks was unaware of what had transpired at the dealership on 29 August

[51] *Jamieson* fn 48 paras 59 and 62.
[52] *Ngqukumba* fn 31 para 10.
[53] D G Kleyn and B Bekink 'The Mandament van Spolie, The Restitution of Unlawful Possession and the Impact of the Constitution' 2016 (79) *THRHR* 308 at 321.

2019, more specifically that Autoglen had handed over the vehicle to Monteiro. That Autoglen was a co-spoliator, in my opinion, is also beyond doubt. However, in the replying affidavit Diedricks gave notice of his intention to amend the notice of motion that possession of the vehicle be restored only by Monteiro; and to seek a costs order against both Autoglen and Monteiro because of their collective actions which resulted in the dispossession.

[72] Given Diedricks' stated intention not to proceed against Autoglen, the high court erred in granting the order that it did against Autoglen. On the facts, and given that Diedricks achieved substantial success, I consider it reasonable that in relation to Autoglen, he should be awarded costs up to and including the date of delivery of the replying affidavit, ie 2 September 2019.

[73] In the result, I would make the following order:

1 The first appellant's appeal is dismissed with costs, including the costs of two counsel.

2 The second appellant's appeal succeeds with costs.

3 Paragraphs 2 and 3 of the order of the court a quo are set aside and replaced with the following order:

'1 It is declared that the third respondent on 29 August 2019 unlawfully despoiled the applicant of his possession of a BMW motor vehicle with engine number 67259275 and chassis number WBA8F36060NT48007.

2 The third respondent is directed to pay the applicant's costs of suit.

3 The second respondent is directed to pay the applicant's costs of suit, up to and including 2 September 2019.'

A. SCHIPPERS
JUDGE OF APPEAL

Plasket JA

[74] I am in agreement with the order proposed by my brother Goosen AJA and agree too with his reasoning for arriving at the conclusion that the appeal should succeed with costs. Consequently, I disagree with the order proposed by my brother Schippers JA and with his reasons therefor. I consider it necessary to deal briefly with why I disagree with his reasoning. In doing so, I rely largely on the facts set out by Goosen AJA in paragraphs 3 to 7 of his judgment.

[75] Schippers JA's judgment raises two issues that require consideration. The first is the capacity in which Monteiro acted and whether he was a co-spoliator; and the second is whether Monteiro was able to restore possession of the vehicle to Diedricks.

[76] It is undoubtedly so that Monteiro played a prominent role in the spoliation of the vehicle and its disposal by sale. This, on its own, does not necessarily mean that, as Schippers JA concluded, he was 'a co-spoliator' or '*the* spoliator'. Given these conclusions, it is necessary to consider the facts in finer detail. Those facts are, on the basis of the *Plascon-Evans* rule,[54] the facts put up by Diedricks that have not been disputed or denied, and the facts put up by Monteiro and Sergio.

[54] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* fn 47 at 634E-I.

[77] What appears clearly from Monteiro's answering affidavit is that, at all times, he acted in a representative capacity on behalf of Street Talk Trading, a company. He acted in that capacity because he was a director of the company. It must be accepted as a fact for purposes of this case that the vehicle at the centre of this dispute belonged to Street Talk Trading. Monteiro stated that, on 28 August 2019, Autoglen advised Street Talk Trading by SMS that the vehicle was at its premises for a service. It did so because, according to Sergio, Autoglen's records reflected that Street Talk Trading was the owner of the vehicle. Because Street Talk Trading was the owner of the vehicle, Monteiro, obviously in his capacity as a director, told Sergio, when they met on 29 August 2019, 'that the motor vehicle should be handed to Street Talk and not to the applicant'. And Monteiro expressly made it clear that he acted in a representative capacity when Street Talk Trading sold the vehicle to Kioilos on 29 August 2019: having stated that the sale agreement was concluded orally, he said that 'I represented Street Talk and Mr Kioilos acted personally'.

[78] It is clear too from Sergio's answering affidavit that whatever Monteiro did, he did on behalf of Street Talk Trading: Monteiro provided Sergio with proof that Street Talk Trading was the owner of the vehicle; when Monteiro spoke to Sergio for the first time on the afternoon of 28 August 2019, he tried to persuade Sergio to hand over the vehicle to 'the owner'; and the following morning, when they met for the first time, Monteiro succeeded in persuading Autoglen 'to release the motor vehicle to the owner against the payment of the invoice in relation to the service which had been carried out, and on condition that he, the third respondent, would deal with any issues which could arise from [Autoglen] handing the vehicle over to the owner'.

[79] Sergio's interactions with Louis and Diane are to the same effect: they told him that they 'represented the owner of the motor vehicle' and provided him with proof of Street Talk Trading's ownership; Louis made it clear to Sergio that 'as far as the owner was concerned, I was not to return the motor vehicle to [Diedricks]'; and Sergio told Diedricks that 'on instructions of the owner, I had given the keys of the motor vehicle to Louis on its behalf'. By this stage, Sergio had never had any dealings with Monteiro and there is no evidence that Louis and Diane acted on his instructions.

[80] In my view, Schippers JA has misconstrued the evidence in important respects. First, it was not Monteiro who told Sergio, immediately after the SMS was sent automatically, that the vehicle was not to be returned to Diedricks but should be handed over to Street Talk Trading. Instead that was the upshot of Sergio's dealings with Louis and Diane. Secondly, when Sergio spoke to Diedricks on the afternoon of 28 August 2019, he did not tell him that Monteiro had instructed him to give the keys to Louis. Rather, he told Diedricks that, on the instructions of 'the owner', he had given the keys to Louis 'on its behalf'. Thirdly, Sergio did not say, when Diedricks went to Autoglen (armed with spare keys), that Monteiro had told him not to release the vehicle to Diedricks. Instead, it was Louis who had said earlier that the owner's view was that the vehicle should not be released to Diedricks, and Sergio had simply told Diedricks that 'due to the documentation handed to me on behalf of the third respondent, I was unable to give him the motor vehicle'.

[81] This reference to the 'third respondent' requires clarification. It cannot be a reference to Monteiro because, at that stage, on the afternoon of 28 August 2019, Sergio had not had any dealings with Monteiro, and Louis and Diane had not mentioned him: all they had said was that they represented the

owner. Furthermore, it was only '[l]ater that same afternoon' that he had 'a discussion' with Monteiro. In these circumstances, it is fair to assume that the reference to the third respondent was, in fact, intended to be a reference to Street Talk Trading.

[82] The effect of Schippers JA's judgment is to collapse the distinction between the separate legal personality of Street Talk Trading and its human agents such as Monteiro. It also has the effect of collapsing the distinction between a principal and an agent by seeking to visit liability on an agent for a representative act on behalf of the principal. Both of these outcomes are in conflict with first principles of company law[55] and the law of agency.[56] They would have far-reaching and deleterious consequences for both company law and the law of agency.

[83] The visiting of liability on Monteiro is not a proper or acceptable alternative to the course Diedricks ought to have followed namely, citing Street Talk Trading as a respondent, rather than one of its agents. His failure to do so is inexplicable, and no attempt was made to explain or justify this failure. In the light of the litigation concerning the ownership of the vehicle, Diedricks must have known of Street Talk Trading's claim of ownership; and if he did not, he was apprised of this fact clearly enough before he deposed to his founding affidavit in this matter. Despite amending his notice of motion (in his reply) in order to change his target for the spoliation order from

[55] Du Bois (ed) *Wille's Principles of South African Law* (9 ed) at 400-401; *Webb & Co v Northern Rifles; Hobson & Sons v Northern Rifles* 1908 TS 462 at 464-465; *Morrison v Standard Building Society* 1932 AD 229 at 238; *Lewis & Co (Pty) Ltd v Pietersburg Ko-operatiewe Boere Vereeniging and Others* 1936 AD 344 at 353.
[56] Du Bois fn 55 at 997-998; *Blower v Van Noorden* 1909 TS 890 at 899-900.

Autoglen, he chose to cite Monteiro and seek an order against him, rather than Street Talk Trading. In my view, this amounts to a fatal non-joinder.

[84] I turn now to the second issue, which is in truth the nub of the case – whether restoration of the vehicle to Diedricks by Monteiro is possible, and whether an order directing restoration of possession would be effective. Schippers JA found that restoration was not impossible and that the court below was correct in finding that the sale of the vehicle was mala fide. The order proposed by Schippers JA, however, does not confirm the order of the court below. Instead, it would set aside that order and replace it with an order declaring that the dispossession was unlawful. I am of the view for the reasons that follow that the finding and the proposed order are both unsustainable.

[85] It is a defence to an application for a mandament van spolie that it is impossible for the person who dispossessed the possessor to restore possession of the spoliated property to him or her. The reason that underpins this defence is that courts generally do not make orders that cannot be carried out. Whether restoration of possession is possible or not is a question of fact.[57]

[86] It is not in dispute that Monteiro, in his capacity as a director of Street Talk Trading, sold the vehicle to one Kioilos, and that the vehicle was delivered to Kioilos. (There is no evidence upon which an inference may be drawn that Kioilos was not a bona fide purchaser.) Monteiro's evidence of the sale was rejected by Schippers JA on the basis that it did not create a genuine dispute of fact and was 'clearly untenable'. I am unable to agree.

[57] *Administrator, Cape and Another v Ntshwaqela* fn 11 at 720C-H.

[87] There was no dispute of fact insofar as the sale of the vehicle by Street Talk Trading to Kioilos is concerned. In the founding papers, an order was sought against Autoglen only, because Diedricks obviously believed that Autoglen was in possession of the vehicle. Evidence of the sale of the vehicle only emerged in Monteiro's answering affidavit and, in his reply, Diedricks said that he had 'no knowledge of the alleged sale of the vehicle'. Diedricks never applied for Monteiro to be cross-examined on the issue. Monteiro's version that Street Talk Trading sold the vehicle must be accepted, even if Monteiro did not provide the detail that Schippers JA expected him to provide. The absence of those details does not alter the fact that the evidence is that the vehicle was sold and delivered to Kioilos. That is an inescapable bottom line: the vehicle has been sold and is no longer in the possession of Street Talk Trading.

[88] In order for Monteiro, in his personal capacity, to restore possession of the vehicle to Diedricks, as he was ordered to do by the court below, he would have to take legal steps to set aside the contract of sale entered into by Street Talk Trading and Kioilos. It seems to me that he may encounter insurmountable difficulties. For instance, I have my doubts that a person who is not a party to a contract has standing to institute proceedings to set it aside. Secondly, if he cleared this hurdle, he would have to establish a basis for the setting aside of the agreement. No one has suggested what this may be. Even if a ground was established, Kioilos may take the view that he wishes to abide by the contract even if it was induced by a misrepresentation or non-disclosure. All of this illustrates that, whatever one thinks of Street Talk Trading's conduct in selling the vehicle, the issuing of an order directing Monteiro – in his personal capacity, I stress – and not Street Talk Trading, to

restore possession of the vehicle to Diedricks, would be an exercise in futility. The order would be impossible to enforce.

[89] I do not understand why Schippers JA, having rejected the defence of the impossibility of the restoration of the property, proposed the alteration of the order of the court below to a declarator that Monteiro 'unlawfully despoiled' Diedricks of his possession of the vehicle. On the one hand, to issue a declarator rather than an order directing the restoration of possession defeats the purpose of a mandament van spolie. Its very object is that 'possession of the thing of which the applicant has been dispossessed should be restored to him'.[58] If, on the other hand, he entertained doubts that possession could be restored, a declarator could not have been made because a successful defence would have been raised.

[90] Schippers JA's reliance on *Jamieson and Another v Loderf (Pty) Ltd and Others*,[59] in which a declarator was issued, requires brief consideration. This judgment is not authority for the proposition that a declarator may be issued if restoration of possession is impossible. The declaratory relief granted on appeal is tied tightly to the peculiar facts of the case. The appellants had brought an application for a mandament van spolie. The application was dismissed. They took the matter on appeal to a full court. After the dismissal of the application, but before the hearing of the appeal, the property was sold by the first respondent. The full court concluded that the appellants should have succeeded in the court of first instance but, because of the disposal of the property, could not make the order that should have been made. Instead, in

[58] *Burnham v Neumeyer* fn 9 at 633.
[59] Footnote 10.

order to reflect the success of the appeal in these unusual circumstances, the full court replaced the court of first instance's order dismissing the application with a declarator that the dispossession had been unlawful. Similar circumstance do not prevail in this case.

[91] For these reasons, additional to those set out in Goosen AJA's judgment, I am in respectful agreement with the order proposed by him.

C. PLASKET
JUDGE OF APPEAL

Appearances

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