



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT
OF APPEAL**

FROM: The Registrar, Supreme Court of Appeal
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***Monteiro and Another v Diedericks (119/2019)*
[2021] ZASCA 015 (2 March 2021)**

The Supreme Court of Appeal (the SCA) today upheld an appeal against an order by the Gauteng Division of the High Court, ordering the appellants to restore possession of a BMW motor vehicle to the respondent.

In August 2019 the respondent, Diedericks, delivered a BMW motor vehicle to Autoglen Motors (Pty) Ltd (Autoglen) for routine maintenance. Street Talk Trading 178 (Pty) Ltd (Street Talk Trading), the registered owner of the vehicle received a SMS notification from Autoglen that the vehicle was under maintenance. At the time Street Talk Trading and Diedericks were parties to a vindicatory action brought by Street Talk Trading. Following receipt of the SMS notification Monteiro, the first appellant, as director of Street Talk Trading took steps to ensure that Autoglen delivered the vehicle to Street Talk Trading. Upon discovery of this Diedericks launched a spoliation application against Autoglen. He cited BMW South Africa and Monteiro as respondents, although no spoliation order was sought against them.

Autoglen opposed the relief on the basis that it was not in possession of the vehicle having delivered it to Street Talk Trading. Monteiro opposed the costs order sought on the basis that Street Talk Trading had taken possession of the vehicle and had sold it to a third party. The high court granted an order requiring Autoglen and Monteiro to restore possession of the motor vehicle.

In a split decision (penned by Goosen AJA with Dambuza and Plasket JJA concurring) the SCA found that the high court had erred in granting a spoliation order against Autoglen when such relief had been abandoned by Diedericks. It further found that the facts

established that Monteiro had acted in his capacity as director of Street Talk Trading; that Street Talk trading had taken possession of the vehicle and that it had sold the vehicle. The order compelling Monteiro to restore possession was not capable of being carried into effect since Monteiro was not in possession of the vehicle and could not take steps to intervene in the contract of sale entered into between Street Talk Trading and the third party. The majority accordingly upheld the appeal with costs.

The minority (per Schippers JA with Mabindla-Boqwana AJA concurring) found that both Autoglen and Monteiro were, on the facts disclosed by them, co-spoliators together with Street Talk Trading. It was found that Monteiro had acted deliberately and mala fide to secure possession of the vehicle by Street Talk Trading in order to subvert the vindicatory action to which it was a party. He had thereupon sold the vehicle to a third party. It was found that no evidence was presented by Monteiro to establish that the sale was bona fide. Nor was evidence presented to establish that an order requiring him to restore possession could not be carried into effect. The minority accepted that the high court order against Autoglen was wrongly granted in the light of such relief having been abandoned.

In a separate judgment concurring with the majority, Plasket JA, took issue with the minority judgment's factual findings. He held that upon the application of the principles by which facts are determined in opposed applications, the averments of Monteiro must be accepted. The effect was that Monteiro was acting as the agent of Street Talk Trading. The effect of the minority judgment, Plasket JA held, was to collapse the distinction between the separate legal personality of Street Talk Trading and its human agents. The failure to join Street Talk Trading, in the circumstances of the case, constituted a fatal non-joinder. Plasket JA also held that essential difficulty faced by Diedericks was that the order requiring Monteiro to restore possession of the vehicle was not capable of being carried into effect.