

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

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

**CASE NO: 44526/17  
9/12/2019**

**CHRISTO MATHYS BRITZ  
ALETTA CATHARINA BRITZ**

**FIRST APPLICANT  
SECOND APPLICANT**

**and**

**JOHANNES STEPHANUS BOTHA**

**RESPONDENT**

---

**JUDGMENT**

---

**KHUMALO J**

Introduction

[1] The Applicants in this application are pursuing to enforce a *Rei Vindicatio* right against the Respondent, for a CAN-AM OFF ROAD OUTLANDER 800CC, 4 Wheel Motor Cycle with Vin Number 3JBEPN16A and Engine Number: M6971716 (referred to as "the CAN -AM" ), which is in the Respondent's possession by seeking an order in the following terms:

[1.1] That the Respondent be ordered to deliver to the 1<sup>st</sup> Applicant the CAN-AM OFF ROAD OUTLANDER 800CC, a Wheel Motorcycle with VIN Number: 3JBEPN16A and Engine Number: M6971716 within five days of this order;

[1.2] That the sheriff of the High Court within the jurisdiction where the

Respondent holds the CAN-AM OFF ROAD OUTLANDER 800CC, a Wheel Motor Cycle with VIN number 3JBEPN16A and Engine Number: M6971716 be authorised to remove the said motorcycle from the possession of the Respondent and deliver same to the First Applicant and/or Second Applicant in the event that the Respondent fails to comply with the relief mentioned in prayer 2 supra;

[1.3] That the Respondent be ordered to pay the costs of this Application;

[2] The CAN-AM belonged to the 1<sup>st</sup> Applicant's deceased father, the late Mr Christo Mathys Britz (the deceased) who passed **away** during 2014.

[3] The 2<sup>nd</sup> Applicant, who is the deceased's wife is the Executrix of the deceased's estate. She, during the administration of the deceased estate, a long time after the deceased passed away, bestowed the CAN -AM on the 1<sup>st</sup> Applicant, allegedly following the wishes of the deceased. The CAN-AM was officially registered in the 1<sup>st</sup> Applicant's name on 12 February 2017. The 1<sup>st</sup> Applicant therefore regards himself as the lawful owner of the CAN-AM and he is suing in that capacity.

### **Factual background**

[4] The deceased bought the CAN-AM on 18 March 2010 from a business called Off Road Evolution which belonged to one Mr Chris Muller ("Muller"). At the time of the deceased's passing the CAN-AM was in the possession of Muller at his business. The deceased had taken it to Muller for repairs on February 2014, the year that he passed away. The 2<sup>nd</sup> Applicant then took over the estate. It is the Applicants' version that the 2<sup>nd</sup> Applicant then endeavoured to pay in full the outstanding balance on the CAN-MA.

[5] Muller was not successful in carrying out the repairs. He, as a result informed the Applicants that Can-Am, the American manufacture will withdraw the purchase of the original CAN-AM and had offered them a brand new motorcycle. He indicated his intention to buy the original CAN-AM for his personal use once the new motor cycle was delivered to the Applicants.

[6] The new CAN-AM was delivered at Waterworld Randburg which refused to pass over ownership until Muller has paid the difference in value in the motorcycles. Muller in the meantime disappeared and could not be traced. His disappearance and

theft was reported to the police on 23 June 2015.

[7] Two years later the Applicants were contacted and informed by the Respondent that he is in possession of the CAN-AM and requested their assistance for its registration in his name. The Applicants informed the Respondent of the disappearance of the CAN-AM and that it belongs to the Applicants.

[8] The Applicants alleges that the Respondent agreed to return the CAN-AM back to them but then later refused on his attorney's instructions. Hence they are claiming as the registered owner, the return of the CAN-AM to him.

[9] The Respondent disputes that the Applicants can assert any rights of ownership but argue that they should be estopped for the reason that they had lost their rights to vindicate the CAN-AM due to their negligence. They had acted negligently by delaying the registration of the CAN-AM into the 1<sup>st</sup> Applicant's name and only attended to that subsequent to his *bona fide* contact with them wanting to transfer the CAN-AM into his name.

[10] He further argues that 1st Applicant could not have become an owner of the CAN-AM as the Applicants have never taken possession of it. Ownership therefore has not passed to the 151 Applicant from the estate of his late father. He therefore disputes the 1st Applicant's alleged *locus standi* to the rei vindicatio relief sought in this Application.

[11] He also alleges that their claim is not in the interest of commerce. He insists that he is the legal owner having legally purchased the CAN-AM from one Mr T Reynecke on 4 January 2017 in terms of a written agreement of sale for an amount of R77 000.00 which he paid cash.

[12] He disputes that the name on the registration document proves that 151 Applicant has become the legal owner. He also contests the alleged reporting of the CAN-AM to the police on the basis that of the two enquiries he made there were no results of a SAPS mark.

[13] He points out that he encountered some difficulty in having the motor cycle registered in his name subsequent to the purchase. He then contacted the deceased's wife.

The Agreement of Sale reads:

Mr T Reynecke, ID [...], hereby confirm to sell Canam 800 quad. To Mr JS Botha ID

[...]. I confirm that I am the rightful owner.

Quad is sold as is where is

Vehicle type: Canam 800 utility quad

Price: R77 000

Seller: T Reyneke

Buyer: J S Botha

[14] In their Reply the Applicants disagree that the Respondent entered into an arm's length commercial transaction, pointing out that the agreement is void as Reyneke claims to be the owner when the Respondent is aware that he is not the owner. There is no confirmatory affidavit from Reyneke. He therefore could not have entered into a lawful transaction for the sale of the CAN-AM.

[15] They insist on the 1st Applicant's *locus standi* as the rightful and registered owner who is entitled to bring this action arguing that 2<sup>nd</sup> applicant as the executor of the estate intended to transfer the ownership of the CAN-AM to 1 1 Applicant, he in turn intended to be the owner upon which the executor transferred ownership to him.

[16] The Applicants also question the Respondent's motive in respect of Reyneke, enquiring why he did not cancel the sale and confront Reyneke when he found out that he is not the owner. Instead he persisted with seeking transfer from the rightful owner.

[17] The Applicants also indicated that Muller has disappeared, a fact Respondent has also confirmed, therefore not possible to join him to the proceedings. The Respondent being the only relevant party since he has confirmed that he is possession of the CAN-AM and his agreement of sale being void.

[18] The issues therefore raised are;

[18.1] the *locus standi* of the Applicants (specifically the is1 Applicant) as the legal owner entitled to a *rei vindicatio* action, and if proven;

[18.2] whether for the reasons raised by the Respondent, the Applicants are to be estopped from claiming the *rei vindicatio* right (negligence an or unnecessary delay since they have never taken possession of the **CAN-AM** from Muller or register the car or take action after disappearance of Muller.

[18] Whether Respondent has obtained any legal status from the sale of agreement of the vehicle justifying his remaining in possession of the vehicle.

## THE LAW

[19] The owner of a thing has a right to possess, use, enjoy, destroy and to alienate it. If any of these things are in any way infringed he has appropriate legal remedies like in the case of *rei vindicatio*.

[20] In the South African law context, the *rei vindication* action's importance is clearly articulated and flows from ***Chetty v Naidoo* 1974 (3) SA 12 (A) 208 - D**. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner upon which it follows that no other person may withhold it from the owner unless he is vested with some rights enforceable against the owner. 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 will then be on the defendant to allege and establish any right to continue to hold against the owner.

[21] An Applicant who brings a *rei vindicatio* or vindicatory action needs therefore to prove two facts, namely, that he is the owner of the thing and that the thing is in the possession of the Respondent. It does not make any difference whether the possessor is *bona fide* or *ma/ a fide*. The owner of the movable property found in the possession of a third party may recover it from any possessor without having to compensate him even from a possessor in good faith who gave value for it. ***Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* [1992] ZASCA 186; 1993 (1) SA 77 (A) at 82** *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A).

## Analysis

### ***Locus standi***

[22]. The ownership that legally vested in the deceased estate was transferred legitimately to 1st Applicant. The Applicant is now the registered owner of the CAN-AM, ownership thereof having been transferred from the deceased estate to him by the 2nd Applicant, as the executor, a person that has authority to do so. The Applicants did not allege that such transfer was in terms of the will but that it is in line

with wishes of the deceased expressed whilst he was alive. Consequently Respondent's demand that a will should have been filed together with the Affidavit is incongruous.

[23] The Respondent has argued that even though transfer was effected, the P1 Applicant never effectively took possession/delivery of the CAN-AM. He therefore could not have effectively become the lawful owner. It is correct that the CAN-AM was at the time of registration no longer in the possession of Muller but in the possession of the Respondent. Such possession does not invalidate the transfer as the deceased estate remained the legitimate owner of the CAN-AM and the executrix the authorised person to transfer its ownership. Respondent by conduct recognised and conceded the authority of the executrix to pass transfer as he confirmed to have approached her for assistance to transfer ownership of the CAN-AM to him. The argument that challenges the transfer of ownership to the P1 Applicant is therefore flawed.

[24]. Noticeably, ownership of movable property does not in our law pass by the making of a contract. Delivery usually occurs either by way of actual delivery (*traditio vera*) when the goods are physically handed over by one person to another, or constructive delivery which concerns those various methods of transferring ownership by which no physical handing over of the *res vendita* takes place. This form of constructive delivery will take place if the buyer is placed in possession of a symbol by which the buyer gains control over the goods. The parties must have either intention to resort to this form of delivery and the symbol must be delivered with the intention that ownership shall pass and the seller must supply the buyer with exclusive control; see *Trust Bank van Afrika Bpk v Western Bank Bpk and Andere NNO* 1978 (4) SA 281 (A) at 301H 302A) where the court held that: Generally speaking the requirements for the valid passing of ownership of a movable thing are: Delivery-actual or constructive-of the thing by the owner - or someone duly authorised to act on his or her behalf- coupled **with a so called real agreement or saaklike ooreenkoms'**, **consisting of the intention on the part of the transferor to transfer ownership and the intention on the part transferee of accepting ownership of that thing.**

[25] Ownership of the CAM-AN was passed to the 1<sup>st</sup> Applicant and the registration documents put in his possession by 2<sup>nd</sup> Applicant, a person duly authorised to do so. The 1<sup>st</sup> Applicant therefore has locus standi to bring this

Application as the registered owner of the **CAM-AN**.

## **Estoppel**

[26] Since the Applicants have established ownership of the CAM-AN, the enquiry should be now whether for the reasons the Respondent raised, the Applicants are to be estopped from claiming the *rei vindicatio* right, that is (i) negligence in respect of having delayed to or failure to take possession of the CAN-AM from Muller or to take action after disappearance of Muller and register the car.

[27] The requirements of estoppel with regard to ownership are well-established:

- (a) there must be a representation by the owner, by conduct or otherwise, that the person who disposed of his or her property was its owner or was entitled to dispose of it;
- (b) the representation must be made negligently in the circumstances;
- (c) the representation must have been relied upon by the person raising the estoppel; and
- (d) such person's reliance upon the representation must be the cause of his or her acting to his detriment. *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 452A-G; *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* 1994 (3) SA 188 at 198G-199A.4

[28] The Applicants have explained that there was a problem with the CAM,-AN and given a chronological explanation brief as to what transpired after the passing away of the deceased. There were reasons proffered why they left the CAM-AN to remain in the possession of Muller. Its fate was still to be decided and the Applicants waiting for Muller to sort out Randburg Water World. They had reported Muller's disappearance and theft afterwards to the police within a reasonable time. The Respondent himself has attested to the disappearance of Muller and the business which he as well could not find. Except for the CAM-AN, Muller held nothing from which he could have been inferred to have been a legitimate owner or someone with authority to sell or legally transfer ownership. The registration thereof remained with the deceased estate and the documents with the Applicant s. The Applicant s reported Muller to the police instead. There was therefore no undue delay or negligence.

[29] For an owner to be precluded from vindicating on the basis of estoppel they had to have negligently entrusted to others possession of their property with the *indicia* of *dominium* or the *jus disponendi*; see *Broekman v TCD Motors (Pty) Ltd* 1949 (4) SA 418 (T); *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 AD and *Electrolux (Pty) Ltd v Khota & another* 1961 (4) SA 244 (W))

[30] It is not the Respondent's case that he was as a result of the conduct of the Applicants or Muller influenced to think that the seller Reynecke was a genuine owner of the CAM-AN. He had not raised any connection or interaction between Muller or the Applicants and Reynecke. He took the words of Reynecke that he was the owner, without any substantiation of such allegation. He also when he discovered that the CAM -AN was registered in the deceased's estate does not allege to have interrogated Reynecke about it. Consequently Reynecke and how he got possession of the CAM-AN remains a mystery . The court has only the hearsay of the Respondent that a person called Reynecke signed an agreement that he was the owner. There is no affidavit from Reynecke, confirmatory or otherwise indicating how he became owner. The appellant therefore failed the first hurdle in the discharge of his duty to establish a representation by conduct of the Applicants and his reliance thereon which was the cause of his acting to his prejudice. The appeal must, accordingly, fail.

[31] The Respondent has also argued that there is a dispute of fact in relation to the purported theft, so the matter should be referred to oral evidence. In the same vein he says that he has no knowledge of the purported agreement between the Applicants and Muller and the alleged theft. On what facts will he be disputing the version of the Applicants then?

[32] No real, genuine or bona fide dispute of fact can be said to have been created by the hearsay evidence that is not within the Respondent's knowledge, of which he has also failed to file a confirmatory affidavit: see in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26 Harms DP said 'that the general rule may not apply 'if the respondent's version consists of bald or incredulous denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers'.



[33]. The Respondent still does not derive any right to possession from the so called false allegations of theft. He still has to prove that from the sale agreement he derived a right to possession. ***Chetty v Naidoo 1974 (3) SA 13 (A)*** The Respondent insists that he is the legal owner having legally purchased the CAN- AM from Reynecke on 4 January 2017 in terms of a written agreement of sale for an amount of R77 000.00 which he paid cash. He alleges that the Appellants' claim is not in the interest of commerce.

[34] The Respondent's claim for having a right to the goods is against Reynecke and not the Applicants in this matter. He therefore could not in light of the case law hold and keep possession of the goods against the Applicants. The Respondent has thus not acquitted himself of the onus to establish a right to continue to hold the goods against the Applicants. He failed to file Reynecke's affidavit that proves under oath how he derived his alleged ownership and authority to sell the CAM-AN. Most importantly from the facts established, Reynecke was not the legal owner and had no authority to sell the car. He himself confirmed that the 2<sup>nd</sup> Applicant's husband was the registered owner.

[36] Since possession of an owner's property by another is prima facie wrongful, it is not necessary in *rei vindicatio* proceedings for the Plaintiff to allege or prove that the Defendant's possession was wrongful and or against the wishes of the Plaintiff; see *Woerman NO v Masondo* 2002 (1) SA 811 (SCA). As long as ownership is established. *Kgomo J in Loffel v Prinsloo* (15838/12) [2014} ZAGPJHC 213 at par 52 held that:

'It does not make any difference whether the possessor is bona fide or mala fide. The owner of a movable property found in the possession of a third party may recover it from any possessor without having to compensate him even from a possessor in good faith who gave value for it.'

[37] It is therefore ordered, that:

[1.1] That the Respondent deliver to the 1<sup>st</sup> Applicant the CAN-AM OFF ROAD OUTLANDER 800CC, a Wheel Motorcycle with VIN Number: 3JBPCN16A and Engine Number: M6971716 within five days of this order;

[1.2] That the sheriff of the High Court within the jurisdiction where the

Respondent holds the CAN-AM OFF ROAD OUTLANDER 800CC, a Wheel Motor Cycle with VIN number 3JBEPN16A and Engine Number: M6971716 be authorised to remove the said motorcycle from the possession of the Respondent and deliver same to the First Applicant and/or Second Applicant in the event that the Respondent fails to comply with the relief mentioned in prayer 1 supra;

[1.3] The Respondent is to pay the costs of this Application;

---

**NV KHUMALO J**

**JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

**On behalf of Applicants:**

**Instructed by:**

**Adv A A Basson**

**LINDA ERASMUS ATTORNEY**

**REF: AC VAN AARDT/ac/CB0007**

**TEL: 076 112 5982**

**FAX: 086 631 7908**

**On behalf of Respondent:**

**Instructed by**

**ADV M Jacobs**

**WWB BOTHA ATTORNEYS**

**TEL: 012 346 3111**

**FAX: 012 346 2520**

**Email: hannah@heckroodtlaw.co.za**

**REF:LERASMU/KS/B211**