

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: **089674/2024**

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

In the matter between:

FISHER, JACQUES ANDRE N.O.	First Applicant
ALERS, LYNETTE HENDRINA N.O.	Second Applicant
and	
S[...], N[...]	Respondent

CORAM: MDALANA-MAYISELA J, MITCHELL AJ AND MZUZU AJ

JUDGMENT

MITCHELL AJ (MDALANA-MAYISELA J and MZUZU AJ concurring)

Introduction

[1] This appeal arises from proceedings launched by the applicants on 8 August 2024 in terms of which the applicants sought an order, *inter alia*, that “*the respondent be directed to immediately give possession of the Toyota Land Cruiser 2[...] motor vehicle with registration number J[...] and VIN Number J[...] motor vehicle presently being used by her and in her possession to the applicants*”

[2] On 18 December 2024 Leech AJ handed down a judgment in which the learned Acting judge dismissed that application with costs. This appeal comes before us as a result of leave to appeal that judgment having been granted by Leech AJ on 10 February 2025.

[3] On 30 January 2025, prior to the application for leave to appeal, the respondent filed a notice of withdrawal in which she stated that she does not intend to oppose that application so long as no cost order was sought or granted against her and she would abide by the decision of the court. There was no appearance for the respondent at the hearing of this appeal.

Background

[4] The applicants brought the application in their capacities as the duly appointed liquidators of Kanivest 3214 CC (“the Corporation”). As outlined above, the primary relief claimed was for an order directing the respondent to give possession to the applicants of a Toyota Land Cruiser motor vehicle (“the vehicle”), the registered owner of which is the Corporation.

[5] The common cause facts, as set out in Leech AJ’s judgment are as follows:

- a. the vehicle was purchased in 2020 by the Corporation under an instalment sale agreement;
- b. the respondent is the estranged wife of R[...] P[...] H[...] S[...] (“S[...]). Divorce proceedings are pending between S[...] and the respondent;
- c. S[...] was the managing member of the Corporation. During happier times, S[...] allowed the respondent the use of the vehicle and she thus came to be in possession of the vehicle, notwithstanding that the Corporation was its registered owner;

- d. on 21 May 2024 S[...] took steps to put the Corporation into voluntary liquidation and the voluntary winding up of the Corporation commenced and the applicants were appointed liquidators of the Corporation with effect from 14 June 2024;
- e. the voluntary winding-up of the Corporation occurred after the breakdown of the respondent's and S[...]’s marriage;
- f. after her estrangement from S[...], the respondent retained possession of the vehicle and she continued to possess the vehicle after the liquidation of the Corporation, up to and including the date this application was launched;
- g. on 30 July 2024 the applicants obtained an order converting the voluntary winding-up into a winding-up by court in terms of section 346(1) of the Companies Act, 61 of 1973. In terms of that same order, the applicants’ powers as liquidators were extended in terms of section 386(5) of the 1973 Companies Act read with section 66 of the Close Corporations Act, 69 of 1984;
- h. the applicants state (and the respondent does not deny) that -
- i. the present value of the vehicle is in excess of R1.2 million and, taking into account payments made by the Corporation under the instalment sale agreement, an amount of R379 722.08 remains owing;
- ii. after settlement of the outstanding debt, there will be a substantial excess available for payment to creditors of the Corporation;
- iii. the applicants are being prevented from realising the value of the motor vehicle, because it remains in the possession of the respondent and she refuses to surrender that possession up to the applicants and is impermissibly using the vehicle as her personal mode of transport;
- iv. demand has been made upon the respondent to hand over the vehicle, but acting on the advice of her legal representatives, she refused to do so.

Respondent’s grounds for refusing to hand over the vehicle

[6] In refusing to hand over the vehicle, the respondent relies on an order granted in her favour in this court, pursuant to a Rule 43 application she brought pending divorce proceedings between her and S[...].

[7] The Rule 43 application resulted in the learned judge, Nkutha-Nkontwana J, ordering, on 14 November 2023, that the respondent¹ is to maintain exclusive use of the vehicle.

[8] In the meantime, on 19 January 2023, the Corporation had launched an application in this court in which it sought return of the vehicle to the Corporation on the basis of a *rei vindicatio*.

[9] The *rei vindicatio* application was heard on 25 October 2023 by Carrim AJ, who on 15 November 2023 handed down an order dismissing the application and, on 4 December 2023, gave a reasoned judgment. Carrim AJ found that the order granted by Nkutha-Nkontwana J resulted in the respondent being entitled to retain possession of the vehicle, pending the divorce action. The relief the Corporation sought had thus already been determined by another court.

[10] In the result, the respondent's position is that she is entitled to retain possession of the vehicle and that the application should be dismissed.

The appeal

[11] As regards the judgment in the Rule 43 application, Leech AJ stated that:

"[10] ... there can be no doubt that the Rule 43 Judgment is binding as between Mr and Mrs S[...] and thus determinative of their rights vis-à-vis the motor vehicle, whether that Judgment was correctly decided or not.

[11] But, say the applicants, they were not parties to the Rule 43 proceedings and neither was the Corporation. Furthermore, they argue that the judgment is one in personam — of application on a limited basis only as between Ms and Mr S[...] - and not a judgment in rem with binding effect as against third parties too. The Rule 43 Judgment is therefore not binding on them and Ms S[...] is not entitled to assert the Rule 43 Judgment as a defence against the Corporation's greater title in and to the motor vehicle.

¹ The respondent in the current proceedings was the applicant in the Rule 43 proceedings

[12] I am of the view that this argument is sound in relation to the Rule 43 Judgment.”

[12] The learned acting judge found that the judgment in the Rule 43 application afforded the respondent no defence. In my opinion that finding is correct.

[13] In considering the *rei vindicatio* judgment by Carrim AJ, the court *a quo* found that:

“[18] ... I am of the view that Carrim AJ has determined the rights of the Corporation, albeit with the possibility that the question could be revisited after the finalisation of the divorce.

[19] Whether or not this relief is competent or was wrongly arrived at it is not for me to say, regardless of what my views on that question might be. Unless and until it is set aside by a court of competent jurisdiction, the rei vindicatio Judgment is binding on the parties to it, which included the Corporation, and it is binding on me.

[20] The subsequent liquidation of the Corporation and the appointment of the applicants as its liquidators does not in and of itself affect the binding nature of the Judgment.”

[14] The court *a quo* further made a finding that:

“[21] ... The applicants say that their position as liquidators has indeed brought about a material change by dint of the applicability of sections 66 of the Close Corporation Act and 84 of the Insolvency Act read with section 386(1)(e) of the 1973 Companies Act and the order of 30 July 2024 quoted above.

[22] The various provisions of the legislation referred to afford the applicants, as liquidators, the powers set out therein. But, with the exception of section 84 of the Insolvency Act, those powers entail the right and competency to exercise remedies that the Corporation could exercise, including an entitlement to claim vindicatory relief. They do not establish new causes of action and nor do they appear to me to override earlier judgments where those remedies have been exercised already.

[23] Section 84 affords the creditor in an instalment sale agreement new remedies and rights, but there is no evidence before me that the jurisdictional

facts underpinning that section have been met. I don't understand that this section extends original rights to the liquidators and therefore I am not persuaded that this section finds application on the facts before me."

[15] These statements are in my opinion too widely framed. The effect of the liquidation of the Corporation was to divest the Corporation of its assets and to vest those assets in the liquidator. It was and is the liquidators' obligation to collect all the assets of the Corporation and arrange for the sale of those assets as expeditiously as possible².

[16] It is not disputed that the vehicle was acquired by the Corporation under an instalment sale agreement with FirstRand Bank Ltd ("WesBank"). Section 84(1) of the Insolvency Act deals with assets acquired by way of an instalment sale agreement. It provides that the instalment agreement must be regarded as creating a hypothec in favour of the seller over the property sold, securing payment of the balance still due.

[17] Under section 84, the applicants, as liquidators of the Corporation, are obliged to deliver the vehicle to Wesbank who will then hold it as security for its claim against the Corporation under the instalment sale agreement³.

[18] A liquidator, who does not have possession of an asset of the estate, must obtain possession when faced with a demand from an instalment sale creditor⁴.

[19] Carrim AJ concluded that the Corporation was not entitled to a *rei vindicatio* order in respect of the vehicle against the respondent. In my view Carrim AJ's judgment has no bearing on whether or not the applicants (as liquidators of the Corporation), are entitled to the order requested by them based on their obligations as liquidators and under section 84 of the Insolvency Act. I find that they are entitled to such an order, and in the circumstances, it is not necessary to make any finding in respect of the effect, correctness or otherwise of Carrim J's judgment.

² The Law of South Africa (LAWSA), Insolvency (Volume 23(1) - Third Edition) para 308

³ LAWSA op. cit. para 373

⁴ Hubert Davies Water Engineering (Pty) Ltd v The Body Corporate of "The Village" and Others 1981 (3) SA 97 (D); Venter NO v Avfin (Pty) Ltd [1996] 1 All SA 173 (A)

Costs

[20] This appeal proceeded on an unopposed basis and there was no appearance for the respondent at the hearing. Nevertheless, in my view, the applicants have been successful in this application and are entitled to their costs on the basis requested by them.

[21] If the respondent had wished to avoid adverse costs order she should have returned the vehicle to the applicants prior to this appeal being heard. As it happened the applicants were obliged to persist with this appeal to obtain possession of the vehicle.

Order

- 1.. The appeal against the decision of the Court *a quo* is upheld.
2. The order of the Court *a quo* is set aside and is substituted by the following order -
 - “a. the respondent is ordered immediately to give possession to the applicants, of the Toyota Land Cruiser 2[...] with registration number J[...] and VIN Number J[...];*
 - b. the applicants are authorised to approach this Court on the same papers, duly supplemented, for an order granting the applicants further powers and/or relief, should the need therefor arise.*
 - c. the respondent is directed to pay the costs of this application on Scale B as contemplated by Rule 67A.”*
3. Save for the costs order in sub-paragraph c above, costs are in the liquidation of Kanivest 3214 CC (in liquidation).

MITCHELL AJ

Acting Judge of the High Court

I agree

MZUZU AJ

Judge of the High Court

I agree and it is so ordered

MDALANA-MAYISELA J

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 10 September 2025.

Date of hearing: 20 August 2025

Date of delivery: 10 September 2025

For the First and Second Applicants: **Adv JW Steyn**

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For Respondent; **No appearance**