CASE NO. I 4241/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE DEPUTY SHERIFF OF TSUMEB **Applicant**

and

RACHEL NATANIEL KOCH **First Claimant**

EVERHARDUS PETRUS FACKULYN GOUS N.O.

CHRISTOFF TSCHARNKTE N.O.

(In their capacity as duly appointed trustees for the

La Rochelle Ranch Trust) **Second Claimant**

CORAM: **VAN NIEKERK, J**

Heard: 22 October 2010

Delivered: 26 November 2010

JUDGMENT

VAN NIEKERK, J: [1] On 27 June 2010 the Deputy Sheriff of Tsumeb filed a notice in terms of rule 58(1) of the rules of this Court in interpleader proceedings. On the date of the hearing the applicant did not appear but there was appearance for both claimants. Initially Mr *Kamanja* indicated that he would present the evidence of the first claimant in terms of rule 58(6), should the court require it. However, Mr *Schickerling* on behalf of the second claimant raised a point *in limine,* which, he submitted, would dispose of the matter. I heard argument on this point and then

reserved judgment.

[2] Interpleaders are not adjudicated upon very often in this Court, but interpleaders by the deputy sheriff appear to be on the increase. Uncertainty exists about some procedural aspects. I shall use this judgment to provide some guidance in relation to matters which appear to me to be pertinent or which seem to cause difficulty. Thereafter I shall deal with the issues raised by the claimants in these proceedings.

[3] Rule 58 provides as follows:

> **"Interpleader**
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> 58. (1) Where any person, in this rule called 'the applicant', alleges that he or she is under any liability in respect of which he or she is or expects to be sued by 2 or more parties making adverse claims, in this rule referred to as 'the claimants', in respect thereto, the applicant may deliver a notice, in terms of this rule called and 'interpleader notice', to the claimants, and in regard to conflicting claims with respect to property attached in execution, the deputy-sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant.
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> (2)(a) Where the claims relate to money the applicant shall be required, on delivering the notice mentioned in sub-rule (1), to pay the money to the registrar who shall hold it until the conflicting claims have been decided.
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> (b) Where the claims relate to a thing capable of delivery the applicant shall tender the subject-matter to the registrar when delivering the interpleader notice or take such steps to secure the availability of the thing in question as the registrar may direct.
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> (c) Where the conflicting claims relate to immovable property the applicant shall place the title deeds thereof, if available to him or her, in the possession of the registrar when delivering the interpleader notice and shall at the same time hand to the registrar an undertaking to sign all documents necessary to effect transfer of such immovable property in accordance with any order which the court may take or any agreement of the claimants.
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> (3) The interpleader notice shall-
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> (a) state the nature of the liability, property or claim which is the subject-matter of the dispute;
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> (b) call upon the claimants within the time stated in the notice, not being less than 14 days from the date of service thereof, to deliver particulars of their claims; and
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> (c) state that upon a further date, not being less than 15 days from the date specified in the notice for the delivery of claims, the applicant will apply to court for its decision as to his or her liability or the validity of the respective claims.
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> (4) There shall be delivered together with the interpleader notice an affidavit by the applicant stating that-
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> (a) he or she claims no interest in the subject-matter in dispute other than for charges and costs;

(b) he or she does not collude with any of the claimants;

(c) he or she is willing to deal with or act in regard to the subject-matter of the dispute as the court may direct.

(5) If a claimant to whom an interpleader notice and affidavit have been duly delivered fails to deliver particulars of his or her claim within the time stated or, having delivered such particulars, fails to appear in court in support of his or her claim, the court may make an order declaring him or her and all persons claiming under him or her barred as against the applicant from making any claim on the subject-matter of the dispute.

(6) If a claimant delivers particulars of his or her claim and appears before it, the court may-

a) then and there adjudicate upon such claim after hearing such evidence as it deems fit;

b) order that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant;

(c) order that any issue between the claimants be stated by way of a special case or otherwise and tried, and for that purpose order which claimant shall be plaintiff and which shall be defendant;

(d) if it considers that the matter is not a proper matter for relief by way of interpleader notice dismiss the application;

(e) make such order as to costs, and the expenses (if any) incurred by the applicant under paragraph (b) of sub-rule (2), as to it may seem meet.

(7) If an interpleader notice is issued by a defendant in an action, proceedings in that action shall be stayed pending a decision upon the interpleader, unless the court upon an application made by any other party to the action otherwise orders."

[4] In this case the interpleader notice reads as follows [the underlining is mine]:

"NOTICE IN TERMS OF RULE 58 (1) OF THE RULES OF THE HIGH

COURT OF NAMIBIA

Whereas the Deputy Sheriff of Tsumeb has on the 15th day of JUNE 2010 at 10h30 attached and took *(sic)* under his control the goods as set out in Annexure "A" hereto in terms of a Writ of Execution issued by the Second

Claimant, EVERHARDUS PETRUS FACKULYN GOUS N.O. and CHRISTOFF TSCHARNKTE N.O. in their capacities as the only Trustees of THE LA ROCHELLE RANCH TRUST, and whereas the said RACHEL NATANIEL-KOCH care of SISA NAMANDJE & CO., 13 PASTEUR STREET, WINDHOEK WEST, the

first Claimant, has claimed the goods as set out in Annexure "B" as his *(sic)* property, now therefore, <u>the above Claimants are hereby called upon within a period of fifteen days from the date of service of this Notice on them to deliver full particulars and</u>

> proof of their claim to the Applicant, and further take notice that the Applicant will apply to the court for its decision as to their liability or the validity of their claims on the 22 Day of October 2010 at 9h30.
>
> Take notice that the Affidavit of JOHN ANDREW PULESTON, the Applicant in terms of Rule 58 (4) is annexed hereto marked "C" in support of the application.
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> DATED at TSUMEB this 26th day of JULY 2010."

[5] The wording of the notice is problematic. The underlined words in the notice quoted above require that the claimants must deliver "full particulars and proof of their claims to the applicant". However, rule 58(3)(b) does not require that the particulars be delivered to the applicant. It states that the interpleader notice shall call upon the claimants "to deliver particulars of their claims." The meaning of the word "deliver" is determined by the definition in rule 1 as being "serve copies on all parties and file the original with the registrar". From this it is clear that the particulars are to be handled like all other pleadings.

[6] Rule 58(3)(b) is in contrast with the equivalent rule of the magistrate's courts, namely rule 44(2)(c), which requires that each claimant shall "lodge with the messenger [of court], an affidavit in triplicate, setting forth the particulars of his claim and the grounds thereof." In terms of rule 44(2)(d) the messenger is responsible to forward one copy of such affidavit to the execution creditor and one copy to the execution debtor. In the High Court each claimant is responsible to properly serve particulars of his or her claim on all the other parties and file the original with the Registrar. Deputy sheriffs should take care not to confuse the provisions of the rules of the magistrate's courts with those of this Court.

[7] The words "full particulars" also appear to lead to misunderstanding. In some cases the "particulars" consist of several documents in haphazard order, e.g. letters to the deputy sheriff complaining about the attachment, explanations by the claimant, receipts, proof of purchase, correspondence by the execution creditor, etc.

In *Corlett Drive Estates v Boland Bank Bpk* 1979 (1) SA 863 (C) it was stated at 867F-H:

> "Dit moet in gedagte gehou word dat die Reels nie van 'n aanspraakmaker verwag dat hy sy aanspraak in die vorm van 'n eedsverklaring moet inklee nie. Al wat van hom verwag word is om "besonderhede" van sy aanspraak te verskaf. Die doel, onder andere, van die uiteensetting van 'n aanspraakmaker se besonderhede van sy aanspraak is om sy teenstander van die strekking van sy saak te verwittig sodat laasgenoemde in staat gestel word om te kan besluit of hy die aanspraak gaan bestry aldan nie. Dit is nie die doel van die Reel dat van die aanspraakmaker verwag word om met die presiesheid wat in die geval van 'n pleitstuk vereis word sy aanspraak uiteen te sit nie. 'n Onduidelike uiteensetting mag wel vir 'n skuldige aanspraakmaker die gevaar op die hals haal dat hy deur middel van 'n kostebevel daarvoor sal moet boet. Mits met redelike sekerheid van sy besonderhede afgelei kan word dat hy 'n egte en regsgegronde aanspraak op die betrokke eiendom of geldsom wat ter sprake is, het, het hy aan die vereistes van die Reel voldoen. Uitdruklike voorsiening is gemaak vir die Hof om getuienis aangaande die aanspraak aan te hoor of om die geskil na verhoor te verwys."
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> [My translation of this passage is as follows:
>
> "It must be borne in mind that the Rules do not expect of a claimant that he should clothe his claim in the form of an affidavit. All that is expected of him is to provide "particulars" of his claim. The purpose, *inter alia,* of the setting out of the claimant's particulars of his claim is to inform his opponent of the tenor of his case so that the latter is able to decide whether to oppose the claim or not. It is not the purpose of the Rule that it is expected of the claimant to set out his claim with the precision which is required in the case of a pleading. An unclear exposition may very well incur for a guilty claimant the danger of having to pay for it by means of a costs order. Provided it can be deducted with reasonable precision from his particulars that he has a genuine and legally based claim to the relevant property or sum of money which is involved, he has met the requirements of the Rule. Express provision is made for the Court to hear evidence regarding the claim or to refer the dispute to trial".

[8] In my view a claimant should set out the particulars concerning his claim in a written document by providing the material facts which are the basis of his claim. The document should comply with rule 62(2) and (3), i.e. it must be clearly and legibly printed or typewritten in standard A4 size and be divided into concise paragraphs which are consecutively numbered. In this document the claimant may

also deal with the particulars of the rival claim(s). Although this document may in some respect be similar to a particulars of claim attached to a combined summons, it is not to be confused with this particular pleading, which has its own set of requirements as provided for in rule 18. If documents are annexed to the claimant's particulars, e.g. as proof of ownership, such as a receipt or proof of purchase or donation, these documents should be described in the particulars and properly marked in alphabetical or numerical order. The Court cannot be expected to wade through a collection of documents which are in no logical order and not properly identified or described in the particulars.

[9] Furthermore, in this case the interpleader notice refers to Annexure "A" and "B", but these annexures are not clearly marked. In fact, the notice is immediately followed by Annexure "C" and then several pages of unmarked pages are attached. Deputy sheriffs should take care when preparing these applications to ensure that the documents are complete, in the correct order and properly marked.

[10] The notice in this case does not call upon the claimants to appear on the date of set down. I have noticed recently that in several other cases where the same notice was issued, the claimants, who until shortly before adamantly claimed attached property as being theirs, did not appear on the date of hearing. It seems to me that a lay claimant may very well think that if he has delivered full particulars and proof of his claim to the deputy sheriff, he need not appear, but that on the date of set down the matter will be decided by the Court on the papers before it. In the case before me the issue did not arise, perhaps because the claimants have legal representation and are therefore aware that they are required to appear in support of their claims, failing which they may be barred under Rule 58(5) from making any claim on the subject-matter of the dispute as against the applicant. In order to avoid misunderstanding the notice should explicitly call on the claimants to appear in Court.

[11] In cases involving the deputy sheriff an interpleader notice in the following

words would more clearly convey to the claimants what is expected of them with regard to both the delivery of their claims and the court appearance:

"INTERPLEADER NOTICE BY DEPUTY SHERIFF

IN TERMS OF RULE 58 (1) OF THE RULES OF THE HIGH COURT OF NAMIBIA

WHEREAS the Deputy Sheriff of .... *(place)* has on the .... day of .... *(date)* at................ *(time)* attached and taken under his/her control the goods as set out in Annexure "A" hereto in terms of a writ of execution issued by the first claimant, ... *(name of execution creditor)* of .... *(address),*

AND WHEREAS the second claimant, ... *(name)* of .... *(address)* has claimed the goods as set out in Annexure "B" hereto as his/her/its property,

NOW THEREFORE, the above claimants are hereby called upon to deliver written particulars of their claims by service of copies thereof on the applicant and on the rival claimant(s) and by filing the original with the Registrar of the High Court, Luderitz Street, Windhoek, within a period of fifteen (15) days from the date of service of this notice upon them,

AND TAKE NOTICE THAT the applicant will apply to the Court for its decision as to his/her liability or the validity of their claims on the .... day of .... *(date)* at .... *(time),* at which hearing date the claimants are called upon to appear in support of their claims.

FURTHER TAKE NOTICE THAT, if a claimant fails to deliver particulars of his/her/its claim within the time stated above or fails to appear in support of his/her/its claim, the Court may make an order declaring him/her/it and all persons claiming under him/her/it barred as against the applicant from making any claim on the subject matter of the dispute.

AND FURTHER TAKE NOTICE THAT in terms of rule 58(4) the affidavit of .... (full names of applicant), is attached hereto as Annexure "C".

DATED at............................ (place) this..........day of....................... (date).

Deputy Sheriff

(Address)

Service on: Registrar

Claimants"

[12] Deputy sheriffs should comply with rule 58(2). The Registrar informs me that this is generally not done. The rule requires that the deputy sheriff shall (a) where the claims relate to money, pay the money to the registrar; or (b) where the claims relate to a thing capable of delivery , tender the thing to the Registrar or take such steps to secure the availability of the thing as the Registrar may direct; or (c) where the claims relate to immovable property, place the title deeds, if available, in the Registrar's possession and deliver an undertaking to sign all necessary documents to effect transfer of the property in accordance with any Court order or agreement of the claimants. In the present case the rival claims relate to movables, but there is no indication that the applicant tendered delivery of the subject matter or otherwise complied with rule 58(2)(b). The significance of compliance with this rule is that the applicant thereby divests himself of the dispute between the claimants *(Kamfer v Redhot Haulage (Pty) Ltd and Another* 1979 (3) SA 1149 (W) at 1152).

[13] In cases where different things are claimed by different claimants the deputy sheriff should issue a separate notice in respect of each dispute. For example, say the deputy sheriff attaches a table, four chairs, and a computer under a single writ. A third party, X, claims the table as his property and another third party, Y, claims

the computer as his property. The deputy sheriff must then issue an interpleader notice in respect of the table to claimant X and the execution creditor and a different notice to claimant Y and the execution creditor in respect of the computer.

[14] I now turn to the point *in limine* raised by the "second claimant". I note in passing that each of the two trustees should have been cited as a separate party in his capacity as trustee *(Mariola and Others v Kaye-Eddie NO and Others NO and Others* 1995 (2) SA 728 (W) 731C-F; *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (WLD), but I shall continue to refer to them jointly as second claimant.

[15] Initially the first claimant filed an affidavit in her personal capacity and in her capacity as executor and heir in the estate of "the late Koch". Her residential address is given as La Rochelle Guest and Hunting Farm, which is also the principal place of business of the defendant and execution debtor, La Rochelle (Pty) Ltd. It is common cause that the disputed goods were attached on the farm. In the affidavit she merely states that she lays claim to the goods attached in the matter between the trustees of La Rochelle Ranch Trust and defendant, but she does not set out the basis of her claim. Later first claimant filed particulars of her claim in another document drawn in the style of a particulars of claim. In this document she states that she is the owner of the goods attached; that she had claimed these goods from the applicant prior to the filing of the interpleader notice; and denies that the second claimant or any other parties are the owners of the assets under attachment.

[16] Mr *Schickerling* submitted that there is no need to even hear the first claimant's evidence, as she failed on her papers to make out a case in support of her claim. At first when Mr *Shickerling* addressed me on the point *in limine,* neither he nor his instructing counsel was aware that the second document referred to above had been filed. The submissions were therefore initially made with the first claimant's affidavit in mind. However, when the existence of the second document

filed by first claimant was brought to his attention, counsel submitted that the point *in limine* also held good for this document. The gist of the point is this: bearing in mind that the onus is on first claimant to prove her claim, she failed to set out sufficient factual allegations in her particulars to support her claim that she is the owner of the goods attached.

[17] Counsel referred me to the case of *Gleneagles Farm Dairy v Schoombee* 1949 (1) SA 830 (AD) in which the Court stated that it is assumed in our jurisprudence that where one litigating party, in execution of a judgment in his favour, has goods attached which are with the other party, and a third party claims those goods as his property, that third party is burdened with the onus to prove his claim to the goods. The Court was of the view that this rule is based on two grounds: firstly, because the third party is the claimant and secondly, because of the presumption [of ownership] which flows from possession. It found that it was not necessary to decide what the position would be if it would be disputed that the goods were in the judgment debtor's possession when they were attached. For purposes of that case it was assumed that the onus was throughout on the claimant. (See also *K & D Motors v Wessels* 1949 (1) SA 1 (AD) at 12).

[18] Mr *Schickerling* submitted that the allegation of ownership amounts to a legal conclusion and that first claimant should have set out factual allegations to show on what basis the allegation of ownership is made. He relied on the extract quoted above from the case of *Corlett Drive Estates* (see para. 7 *supra]* and also referred the Court to the discussion of that matter in *Kamfer v Redhot Haulage* case *(supra)* at 1153B-1154A where the following was said:

> "Mr *Van Biljon,* on behalf of the second respondent, sought the dismissal of the application on a slightly different basis. He argued that there was insufficient on the papers to establish that a claim had been made against the applicants by the second respondent. He therefore also asked that the application be dismissed in terms of sub-rule (6) (d). Alternatively it was submitted that in the absence of evidence, it could

not be decided whose claim should prevail .... As authority for his submission that it did not suffice for an applicant under Rule 58 to merely allege that adverse claims were being made to property or money held by him, and that such claims had to be valid ones, Mr *Streicher* referred to and relied on the recent decision of *Corlett Drive Estates v Boland Bank Bpk en 'n Ander* 1979 (1) SA 863 (C). Dealing with Rule 58 (1), the Full Bench of the Cape quoted the following *dictum* of VAN HEERDEN J, whose judgment was on appeal:

> "Eise is strydig teen 'n applikant ingevolge hierdie Hofreel wanneer elke aanspraakmaker se eis, indien dit bewys word, 'n geldige gedingsoorsaak teen die applikant sal uitmaak. Dit volg dus dat die besonderhede wat elke aanspraakmaker ingevolge Hofreel 58 (3) (b) opgeroep word om af te lewer, feite vir sy aanspraak moet uiteensit wat indien dit bewys word 'n geldige gedingsoorsaak teen applikant sal openbaar." [for translation see para. 7 *supra]*

(See at 867.) In the judgment of VAN WINSEN J (SCHOCK and FRIEDMAN JJ concurring) there is no quarrel with the principle that " 'n geldige gedingsoorsaak" must be disclosed. Where the learned Judge on appeal differed with the Court *a quo* was in regard to the precision with which the claim need be set out. In holding that the particulars of a claim under Rule 58 should not be approached as if it was a pleading,
VAN WINSEN J (at 867) stated:

> "Mits met redelike sekerheid van sy besonderhede afgelei kan word dat hy 'n egte en regsgegronde aanspraak op die betrokke eiendom of geldsom wat ter sprake is, het, het hy aan die vereistes van die Reel voldoen." [for translation see para. [7 *supra]*

This then is a reinforcement of the requirement that each claimant must, on the allegations respectively made by them, have a valid claim against the applicant to the money or property in dispute."

[19] In my view the authority relied on rather supports the submissions made by counsel for the first claimant, which are to the effect that, even if the bare allegation of ownership are not supported by facts, the factual basis may be provided during the hearing of evidence as is envisaged in rule 58(6)(a). It is instructive to compare claimant's particulars with the allegations which a plaintiff in a vindicatory action is required to make in order to set out a valid cause of action. It is trite that he is merely required to allege that he is the owner of the property to be

vindicated without making any further factual allegations. It seems to me that, if, as was stated in the *Corlett Drive Estates* case, the exposition of a claimant's particulars need not be set out with the precision required of pleadings, the first claimant's particulars are sufficient in the circumstances. They set out a valid cause of action. In any event, should it turn out after evidence has been heard that there is, indeed, an unnecessary lack of clarity, the threat of a cost order may be implemented.

[20] The Court in the *Gleneagles Farm Dairy* case *(supra)* quoted with approval (at 838) the following extract from *Policansky Brothers v Hanau* 25 S.C. 670 at 672:

> "There is a presumption of law, no doubt and a presumption, I think, of common sense that, when goods are found in the possession of anyone, they belong to that person; and when there is a debtor in the ostensible possession . . . the things that are found in his possession and taken possession of by the sheriff or messenger of the court, who is charged with the execution of the judgment, would *prima facie* be deemed to be the goods of such debtor; but it appears to me that the presumption, although I think it is a perfectly proper one, is one which should be considered in view of the circumstances of each particular case and which can be swept away and upset by evidence."

[21] In this case the Deputy Sherriff attached goods on the farm La Rochelle, which is also the residence of the first claimant. The list of items in dispute is quite long. Bearing these facts in mind, I agree with Mr *Kamanja* that the first claimant may be able to sweep away and upset the presumption, even if only with respect to some of the items attached, should she be granted the opportunity to present evidence in support of her claim. He submitted that, even if the factual particulars provided in support of her claim may be few, she should be granted that opportunity. I did not understand second claimant to suggest that the matter should, in the event that the point *in limine* is dismissed, be dealt with as provided for in rule 58(6)(b), (c) or (d). This means that it will probably be adjudicated upon in terms of rule 58(6)(a), which requires the Court to hear such evidence as it deems fit.

[22] For the reasons mentioned the point *in limine* is therefore dismissed. The issue

of costs stand over.

VAN NIEKERK, J

Appearance for the parties

For first claimant:	Mr Kamanja Sisa Namandje & Co
For second claimant:	Adv J Schickerling Instr. by Koep & Partners