



CASE NO.: I 579/2011

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NITRATE INVESTMENTS (PTY) LTD

APPLICANT/PLAINTIFF

vs

IMMANUEL SHINDUME

1ST RESPONDENT/DEFENDANT

WINDHOEK TRUCK AND BAKKIE CC

2ND RESPONDENT/DEFENDANT

CORAM: MILLER, AJ

Heard on: 15 June 2012

Delivered on: 27 June 2012

JUDGMENT

MILLER, AJ: [1] This is the return date of a *Rule Nisi* issued on 17 February 2012. To place the matter in context it is necessary to have regard to the circumstances in which it arose.

[2] On 04 March 2011 the applicant commenced proceedings against the first respondent to whom I will refer only as the respondent in this Court by way of a combined summons. The applicant's cause of action was one of *rei vindicatio*. The plaintiff pleaded its cause of action prior to the subsequent amendment in paragraphs 5-9 of the Particulars of Claim; as follows

- “5. At all relevant times hereto, the plaintiff was the owner of a Mercedes Benz Truck with registration number N 133 795 W (hereinafter referred to as the plaintiff's truck). Proof of plaintiff's ownership thereof is annexed hereto as Annexure “NI1”.
6. As at 22 October 2010 the defendant acquired possession and/or ownership of the plaintiff's truck. Proof thereof is annexed thereto as Annexure “NI2”.
7. The defendant allegedly acquired such possession and/or ownership of the plaintiff's truck from Mr. Leon Ferreira.
8. The plaintiff however at all relevant times hereto had no intention of entering into a transaction for the sale of the plaintiff's truck to the defendant.
9. The defendant is in possession of the plaintiff's property and such possession is *prima facie* wrongful.”

[3] I confess to not quite understanding what the applicant sought to convey with the allegation in paragraph 9 that the defendant's possession was “*prima facie*” unlawful. I would have thought that either it was wrongful or it was not. Nothing turns on that, however, and I will leave it at that, I note that the subsequent amendment of this pleading addressed the problem.

[4] Based upon the abovementioned allegations the applicant claims the following relief:

- “1. Delivery of the plaintiff’s truck.
2. Alternatively the value of the plaintiff’s truck to be calculated on the day of trial.
3. Costs of suit.
4. Further and/or alternative relief.”

[5] On 14 March 2011, the deputy-sheriff in Windhoek served the summons upon the respondent.

[6] On 23 March 2011, the respondent caused a notice of intention to defend to be filed and served and subsequently on 20 April 2011 the respondent’s plea was filed. In his plea the respondent denied that the applicant is the owner of the truck and pleaded instead that he was the owner. The plea was subsequently amended by a doing an alternative defence that the applicant is estopped from asserting its right of ownership.

[7] There the pleadings remained for the time being until the 9th of February 2012, when I advised the parties that the matter had been assigned to me as the managing judge in terms of Rule 37 (1) of the Rules of the High Court.

[8] I scheduled a case management for 22 March 2012, on which date the matter was enrolled for hearing on 11 June 2012. I also made some orders related to the preparation of the case.

[9] I need only add for the purposes of this judgment that following amendments to the particulars of claim and the plea the matter could not proceed and is now enrolled for hearing on 6 November 2012.

[10] I was advised during the case management conference on 22 March 2012, that the applicant obtained an *ex-parte* order against the respondents before another member of this Court on 17 February 2012 in the following terms:

"IT IS ORDERED:

1. That a *rule nisi* is hereby issued, calling upon the Respondents to show cause, if any, to this Honourable Court, on Friday, 2 March 2012 or so soon thereafter as counsel for respondents may be heard, why an order in the following terms should not be made:

1.1 Directing and ordering the Deputy-Sheriff of the above Honourable Court for the district of Windhoek, alternatively, any other Deputy-Sheriff of the above Honourable Court in whose jurisdiction the truck referred to below may be found, to attach a certain Mercedes Benz 1517 4x4 truck, bearing registration number N 133 796 W, vehicle identification number 36011320102071 and engine number 35290008307 ("the truck"), currently in first respondent's possession,

pending resolution of a civil action currently instituted by applicant against first respondent under case number I 579/2011 (“the action”).

- 1.2 Directing and ordering the afore named Deputy-Sheriff to, upon attaching the truck as aforesaid, store the truck at the premises of Aucor Namibia (Pty) Ltd, situated at the corner of Michelle & Platinum Street, Prosperity, Windhoek, Republic of Namibia, pending resolution of the action.
 - 1.3 Interdicting and restraining respondents from selling and/or hypothecating and/or encumbering the truck and/or removing the truck from the jurisdiction of the above Honourable Court and/or in any way disposing of the truck, pending resolution of the action.
 - 1.4 Directing and ordering applicant to provisionally pay all costs involved in storing the truck at the premises of Aucor Namibia (Pty) Ltd as aforesaid, pending resolution of the action.
 - 1.5 Directing and ordering that the costs of this application against first respondent be costs in the cause of the action, such costs pursuant on the employment of one instructing and one instructed counsel. (In the event of any other respondent opposing, directing and ordering such respondent to pay the costs of this application, such costs pursuant on the employment of one instructing and one instructed counsel).
2. That the relief set out in paragraphs 1.1 to 1.3 above shall serve as an interim order with immediate effect, pending resolution of the action.
 3. That any respondent intending to anticipate the *rule nisi* shall do so only upon 72 hours’ notice to applicant.”

[11] The respondent opposes the confirmation of the *Rule Nisi*. The second respondent took no part in these proceedings.

[12] At the hearing before me the applicant was represented by Ms. van der Merwe and the respondent was represented by Mr. Namandje.

[13] Mr. Namandje submitted that the applicant's decision to approach this court on an *ex-parte* basis on 17 February 2012 constituted an abuse of the courts process. He referred to the fact that the first respondent had been in possession of the truck for several months prior to that, with full knowledge of the applicant's claim to it, but nonetheless made no attempt to dispose of the truck. In such circumstances, he submitted, the applicant ought to have served the application on the first respondent beforehand. There is merit in those submissions.

[14] In the founding affidavit the applicant seeks to justify its entitlement to bring the application on an *ex-parte* basis on a single sentence appearing on page 40 of the affidavit which reads as follows:

"The application is brought on an *ex-parte* basis because I fear that if first respondent is given notice of this application, he will dispose of the truck or cause the truck to be removed from the jurisdiction of this Honourable Court to be applicants detriment."

[15] Given the history of the action which I have sketched that statement rings distinctly hollow, and is not based on any fact.

[16] Ms. van der Merwe in the Heads of Argument filed by her submitted that the issue of the *ex-parte* application was *res judicata* and thus no longer open for determination by this court. In argument before me she correctly and properly conceded that the earlier submission cannot be sustained. She submitted that the respondent had the option to anticipate the return date if he considered himself aggrieved in the process. In the circumstances he was not prejudiced, it was submitted.

[17] In ***Knouws NO v Joseph & Another 2007 (2) N.R. 792*** at page 796 paragraphs 18 & 19 Damaseb JP states the following:

“[18] This application was brought *ex parte*, i e without notice to the respondent(s). It is trite that a party who comes to court without notice to a person affected by the relief it seeks must act *bona fide* and must disclose all relevant facts to the court. As to the requirement of good faith in *ex parte* applications, see Erasmus *Superior Court Practice* at B142 and the authorities there collected. Acting *bona fide*, in my view, includes the duty to act fairly towards the affected person. Thus considered, Mr. Corbett’s argument that all the applicant(s) was required to do was to serve the *rule nisi* only without the founding papers whose fruit the order is, presents fundamental problems. To require only service of a court order on a respondent against whom relief was obtained *ex parte* is, in my view, inherently unfair and unjust. It is the founding

papers, not the court order, which contain the case the respondent(s) were required to meet. Article 12(1)(a) of the Namibian Constitution states:

In the determination of their civil rights and obligations...all persons shall be entitled to a fair hearing...

A fair hearing it can hardly be disputed, includes the right to know what case you are required to meet.

[19] It was incumbent upon the applicant, and the court, to ensure that the respondent(s) had proper notice of the case he (they) had to meet and the only reasonable interpretation that can be placed on the court order of 27 July is that not only the order, but the entire application, had to be served on the respondent(s). Rule 6(5)(a) of the rules of this court requires that true copies of the notice of motion and all annexures to it must be served on the affected party. "Service" normally includes an explanation of the nature and meaning of the process (*Botha NO v Botha 1965 (3) SA 128 (E) at 130 F-G*; Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa 4 ed at 279*).

[18] Ms. van der Merwe submitted that this case is distinguishable if regard be had to *Witvlei Meat (Pty) Ltd & Five Others vs Disciplinary Committee for Legal Practitioners and Five Others* (an unreported judgment of this court delivered on 20 February 2012).

[19] I do not agree. This case is an all fours with the Knouwds case. I add that in this case only the order was served on the first respondent's legal practitioners on 28 February 2012.

[20] In addition, seen against the backdrop of the litigation in this matter and how it developed up to the point where the application was launched, it cannot be said that the applicant acted *bona fide* and in good faith. The applicant's decision to bring the application on an *ex parte* basis seems to me to be opportunistic.

[21] I will on that basis alone be inclined to discharge the *rule nisi* issued.

[22] In addition and on the merits of the matter I find that the applicant has not made out any case for the attachment of the truck. The issue of the ownership of the truck remains in dispute in the upcoming trial. In its amended plea the first respondent in addition pleads that the applicant is stopped from asserting its right of ownership. I will not say more about that other than the state that the issues raised by the first respondent are not frivolous and constitute triable issues. The applicant claims as alternative relief monetary compensation to the value of the truck. There is no allegation that the respondent will not be capable of satisfactory the amount claimed.

[23] I will accordingly make the following order:

[24] The *rule nisi* issued on 17 February 2012 is discharged with costs.

MILLER AJ

ON BEHALF OF THE APPLICANT:

Instructed by:

Ms. van der Merwe

Engling, Stritter & Partners

ON BEHALF OF 1ST RESPONDENT:

Instructed by:

Mr. Namandje

Sisa Namandje & Company