'Reportable'

SUMMARY

CASE NO.: (P) I 2500/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

STANDARD BANK NAMIBIA LIMITED *v* MARTHIN LUCKY NAMUPOLO AND ANOTHER

PARKER J

2012 February 15

Practice - Trial – In respect of vindicatory action – Vindicatory claim for return of a thing (a motor vehicle) which is the object of the vindicatory action – Court finding second defendant has been in possession of the thing as from the time second defendant filed his plea – Court accepting that during the course of the morning before the trial commenced second defendant's legal representatives informed plaintiff's legal representatives that second defendant no longer had possession of the thing – Court finding further that the thing had been sold by a Close Corporation (which held a lien over it) of which second defendant is the managing member and controller of all its activities and second defendant in turn had sold the thing to a third party not a party to the action with the set purpose of keeping it out of the reach of the plaintiff – Court finding further that all this was done when the second defendant was aware of the action and also that the Court has not determined the action – In the circumstances plaintiff's counsel informing the Court that plaintiff was abandoning the action on the merits (including the issue of estoppel) – Court accordingly accepting counsel's argument that a determination of the matter on the merits (including the issue of

estoppel) in due course would be academic and otiose and so the only relief sought is costs – Court holding that by his wrongful and improper conduct second defendant thwarted the plaintiff's relief and denied plaintiff his entitlement to have the dispute determined by the Court in violation of plaintiff's Article 12(1) (of the Namibian Constitution) right – Consequently, Court mulcting second defendant with costs on the scale as between attorney (legal practitioner) and his or her own client.

Held, where a party's improper and wrongful conduct prevents another party from having its rights and obligations determined by a court seized with the matter in an ongoing proceeding that constitutes a violation of that party's Article 12(1) (of the Namibian Constitution) right, and it is the pinnacle of prejudice that such litigant can suffer.

Held, further, the fair and proper administration of justice cannot thrive if legal representatives were not scrupulous in their dealings with the courts, and a legal practitioner who failed to inform the court of the existence of all material matters within his or her knowledge about which the court should have been informed is guilty of professional misconduct, and that applies when the Registrar is carrying out judicial functions.

CASE NO.: (P) I 2500/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

STANDARD BANK NAMIBIA LIMITED **Plaintiff**

and

MARTHIN LUCKY NAMUPOLO **First Defendant**
R ARANGIES t/a AUTO TECH **Second Defendant**

***CORAM*:** **PARKER J**

Heard on: 2012 February 1
Delivered on: 2012 February 15

JUDGMENT

PARKER J: [1] The genesis of this matter lies in an action in terms of summons sued from the Court on 6 August 2008 under case No. I 2500/2008. It is crucial – as will become apparent shortly – to note at this juncture the parties as cited on the summons: Plaintiff: Standard Bank Namibia Limited and First Defendant: Marthin Lucky Namupolo and Second Defendant: R Arangies t/a Auto Tech. It is also important to note the following, and I shall revert to it in due course: The plaintiff is represented by Mr Tötemeyer, SC, instructed by Behrens & Pfeiffer, and the second defendant by Mr Barnard, instructed by Messrs Chris Roets. Both instructing counsel have been the same legal representatives of the parties since the institution of the action on 6 August 2008. I shall deal with the significance and cruciality of this observation in due course.

[2] The thing which is the object of the plaintiff's vindicatory action is a motor vehicle 2005 BMW 120i (engine number A295H334 and chassis number OPM63516) which the plaintiff contends it is the owner thereof and which the second defendant is in possession thereof. As to the thing; the relief the plaintiff seeks thereanent is an order directing the first defendant and the second defendant to return it to the plaintiff and failing compliance therewith an order directing the Deputy-Sheriff to take it into his possession and deliver same to the plaintiff.

[3] In the second defendant's plea filed on 1 October 2008, the second defendant states that 'the second defendant is Mr R Arangies'. In amplication of the plea, the second defendant states:

> '3.3 The Second Defendant, in amplification of his plea *supra*, pleads that the Second Defendant is in fact Auto Tech Panelbeater CC, a close corporation with limited liability, duly registered and incorporated in terms of the Close Corporations Act and having its principal place of business situated at Erf 1123, Industrial Area, Tsumeb, Namibia.'

Further, the second defendant admits that the thing is in the second defendant's possession and pleads that 'it is entitled to possession of such motor vehicle by virtue of a lien over such motor vehicle.' The second defendant amplifies as follows:

> '5.3 The Second Defendant, in amplification of its plea *supra*, pleads that on or about 17 January 2007 at Tsumeb, Namibia, the First Defendant delivered the damaged motor vehicle to the Second Defendant with instructions to provide a quotation to repair the motor vehicle to its pre-collision condition and, if the First Defendant accept such quotation, to repair the motor vehicle to its pre-collision condition.'

And he concludes:

> '5.16 In the circumstances, and although no contractual relationship exists between the Second Defendant and the Plaintiff, the Second Defendant is entitled to payment of its account for storage costs prior to delivering possession of the motor vehicle to the Plaintiff, or for that matter, any other party.'

[4] From all the aforegoing, I make the following pivotal factual findings; and *a fortiori*, they are facts that are undisputed. First, as Mr Tötemeyer submitted, that the plaintiff held the highest interest in the thing is not disputed: not disputed by either the first defendant or the second defendant. Second, as far back as 1 October 2008 (the date on which the second defendant filed his plea, as aforesaid) this fact was in the knowledge of the second defendant and of his instructing counsel. That is to say; both the second defendant and his legal representatives were aware and knew that the thing was the object of the present ongoing civil action (under Case No. I 2500/2008) to which the plaintiff, who has the highest interest in the said thing, and the first defendant and the second defendant are parties, and further that the Court had not yet determined the parties' rights and obligations in the action, to which determination the parties are entitled in terms of Article 12(1) of the Namibian Constitution. Despite this legal and constitutional fact which, as I say, was well known to Chris Roets, the instructing counsel and the legal representatives of the second defendant, the following was done: Auto Tech Panelbeater CC (represented by the selfsame Christ Roets) of which the second defendant was at all material times (in the second defendant's own words) 'the managing member' and which the second defendant (again in the second defendant's own words) 'has at all material times been in control of all its activities in such capacity', brought an application for

judgement by default before the Registrar under Case No. I 4609/2009 and obtained judgment on 29 April 2010. And with great verve, Mr Barnard harped on the fact that the selfsame thing was sold in execution of the Writ of Execution that was obtained pursuant to the aforementioned judgment by default obtained on 29 April 2010. And for Mr Barnard – seemingly taking his cue from his instructing counsel – 'there is no basis upon which the Court can come to any finding relating to the impropriety of the sale in execution (of the thing)'.

[5] With the greatest deference to Mr Barnard; Mr Barnard misses the point. It is trite that it is the duty of a litigating party's legal representative to inform the court of any matter which he or she is aware. A legal representative who appears in court is not a mere agent for his client, but has a duty towards the Court to ensure the efficient and fair administration of justice. The fair and proper administration of justice cannot thrive if legal representatives were not scrupulous in their dealings with the Court. This duty of legal representatives is stated succinctly thus in *State v Baleka and Others* 1988 (4) SA 688 T at 705E:

> 'The administration of justice is founded upon the preservation of the dignity of the Courts. It is the duty of counsel and attorneys to assist in upholding it. They are not mere agents of the clients; their duty to the Court overrides their obligations to their clients (subject to their duty not to disclose the confidences of their clients).'

Indeed, in England a solicitor who failed to inform the Court of all material matters within his or her knowledge about which the court should have been informed is guilty of professional misconduct. I see no reason why a legal practitioner in Namibia should not stand in the same position (*Halsbury's Law of England*, Fourth edn: paras 299, 304). Moreover, I see no good reason why all this should not apply to legal representatives when they apply to the Registrar for judgment

by default in terms of rule 31 of the Rules, that is, when the Registrar is carrying out judicial functions. I have no doubt in my mind that Chris Roets knew very well that if they had informed the Registrar of the pending matter under Case No. I 2500/2008 the Registrar would not have granted the judgment by default; and so they decided not to cite the plaintiff in the application or inform the Registrar of the existence of Case No. I 2500/2008.

[6] Thus, in the instant case it cannot seriously be argued that despite their duty to the Court and the Registrar, Chris Roets acted professionally and honourably when they brought the default judgment application and obtained judgment without as much as joining the plaintiff who the second defendant and his legal representatives, Chris Roets, knew very well has the highest interest in the thing which is the object of the present action. It is as clear as day that in the bringing of the application, in the obtaining of judgment, in the filing of the Notice of Sale in Execution and in the sale of the thing in execution the second defendant, represented at all material times by Chris Roets, decided, without a wraith of justification, to disregard – as it were – the plaintiff; the plaintiff who is the owner of the thing and when the thing is the object of the ongoing action in the selfsame Court, as I have said more than once. It matters two pence whether the default judgment application was made to the Registrar of the Court. And yet Mr Barnard submits that 'there is no basis upon which the Court can come to any finding relating to the impropriety of the sale in execution'. I do not, with respect, accept Mr Barnard's submission: it has no merit and it adds no weight.

[7] Keeping all the aforegoing in my mental spectacle, I feel confident in holding that the sale in execution of the thing was not only improper, it was also wrong; and the impropriety and wrongfulness was informed by the seemingly

unprofessional and dishonourable conduct of Chris Roets who, as I have said *ad nauseam*, are the instructing counsel at all material times in the present matter and further that the sale in execution of the thing is the apogee of impropriety and wrongfulness on the part of the second defendant in this matter. Indeed, the impropriety of the sale in execution assumes even greater heights when, as Mr Tötemeyer submitted – and it was not challenged or controverted – the second defendant who 'at all material times was the managing member' of the Auto Tech Panelbeaters CC and was in control of all its activities in that capacity – as he himself says – bought the thing from the CC (who, according to the second defendant, held a lien over the thing) and thereafter sold it to a third party with the set purpose, as I find it to be, of keeping the thing out of the reach of the plaintiff. As a result of the improper and wrongful conduct of the second defendant, assisted in no small measure by the seemingly unprofessional and dishonourable conduct of Chris Roets, when the trial (at which the issue of estoppel was going to be argued first as a separate issue before the rest of the merits) commenced Mr Tötemeyer informed the Court as follows. Counsel stated that the said conduct of the second defendant had changed plaintiff's position. The thing is no longer in the second defendant's possession contrary to what the second defendant had stated in his plea as far back as 30 September 2008: the thing is now in the possession of a third party. For that reason Mr Tötemeyer submitted that there was no purpose for the plaintiff to pursue the action on the merits any longer (including the issue of estoppel). I accept the submission as reasonable: any determination made by the Court in due course in the action on the merits, including the estoppel issue, will be merely academic and, indeed, otiose, as a matter of law. Consequently, I have no difficulty – none at all – in accepting Mr Tötemeyer's submission that the second defendant's improper conduct has thwarted the relief sought by the plaintiff in the present matter.

[8] Thus, the powerful submission by Mr Barnard that the plaintiff had been warned well in advance that he had misjoined the second defendant and that the plaintiff did nothing to remedy the misjoinder cannot advance the case of the second defendant: the submission rather destroys and buries the second defendant's case. It goes to buttress the finding I have made previously that the conduct of the second defendant respecting the default judgment application and matters connected therewith is improper, wrong and, indeed, 'reprehensible', as Mr Tötemeyer put it. The reason is that aware of the plaintiff's ownership of the thing and the fact that the individual rights and obligations of the parties thereanent were yet to be determined by the Court, the second defendant acted in the manner set out previously and thereby thwarting the relief sought by the plaintiff in the vindicatory action as it has prevented the plaintiff from having its rights and obligations determined by this Court; and that, in my opinion, is a violation of the plaintiff's Article 12(1) basic right guaranteed to it by the Constitution.

[9] Nevertheless, in the face of all this, Mr Barnard speculates that the plaintiff would have failed on the estoppel issue and that the plaintiff would have had to lead evidence to prove its contention thereanent. I agree. But I fail to see what makes Mr Barnard think that Mr Tötemeyer would not have adduced evidence in that direction, seeing that the present is a trial proceeding. I am constrained to say, and with great respect, that it appears to be cynical of Mr Barnard, who represents the very person who has thwarted the plaintiff's relief by his improper and wrongful and reprehensible conduct which has stood in the plaintiff's way, preventing the plaintiff from pursuing all the relief it has prayed for in the summons, to now say that the plaintiff would have been expected to adduce

evidence to prove its case. As Mr Tötemeyer stated in reply thereto, that is what he would have done had the second defendant, by his improper and wrongful conduct, not thwarted the plaintiff in his pursuit of all the relief sought in the summons. And so, apart from costs the plaintiff seeks no further relief on the merits. As I have said previously, it is a reasonable approach, if regard is had also to the fact that it was just moments before the trial began that the second defendant's legal representatives informed Mr Tötemeyer that the second defendant was no longer in possession of the motor vehicle (the thing) as he had sold it to a third party, as aforesaid.

[10] Thus, in the circumstances and on the facts of the case, Mr Tötemeyer, therefore, prays the Court to mulct the second defendant with costs on the scale as between attorney (legal practitioner) and his or her own client up to the date of the trial, even though the plaintiff has decided to abandon the action on the merits, including the estoppel issue, due to those circumstances.

[11] As respects costs; I accept – in principle, of course – Mr Barnard's submission that since the plaintiff has abandoned the action, it is rather the plaintiff who should pay the second defendant's costs, and on a scale as between party and party. (See *Central Maintenance Close Corporation v Council for the Municipality of Windhoek* Case No. I 3671/2007 (Unreported).) It is my view, however, that the principle there cannot apply in the instant case. In the instant case, as I have said many times, the plaintiff has been forced by the improper, wrongful and reprehensible conduct of the second defendant (who – significantly – was legally represented at all material times by Chris Roets, Mr Barnard's instructing counsel) to abandon the action on the merits, including the issue of estoppel on the basis that any determination by the Court of the matter on the

merits in due course, including the estoppel issue, would be otiose and academic, as aforesaid. For that reason, to award costs to the second defendant would indubitably be tantamount to rewarding the second defendant for his improper and wrongful conduct.

[12] In a civilized, democratic and constitutional State like ours decent persons approach the courts for the courts to determine any disputes they may have with other persons or any right they may wish to assert because they do not want to take the law into their own hands. Need I say more: that, in essence, the second defendant's improper and wrongful conduct amounts to the second defendant taking the law into his own hands; and, what is more, it amounts to preventing the Court from determining the action that it was seized with – much, in my opinion, to the severe and irredeemable prejudice of the plaintiff. But, Mr Barnard asks rhetorically, 'What is the prejudice?' In my view the prejudice is the plaintiff being prevented from having his rights and obligations determined by this Court on the merits, including the issue of estoppel, respecting the thing in which it has the highest interest. That, I must signalize, is the pinnacle of prejudice that such litigant can suffer in judicial proceedings. And so, therefore, for all that, in my opinion, the second defendant must be made to pay, and pay in the form of special costs so as to signify the Court's utter disapproval and censure of the second defendant's improper and wrongful conduct that has resulted in the violation of the plaintiff's Article 12(1) (of the Namibian Constitution) basic right, as I have said more than once.

[13] While I have not found that in bringing the aforementioned default judgment application Chris Roets acted outwit their mandate, I find that the defendant gained directly in the chicanery of buying the thing from the very CC he (in his

own words) is ‘the managing member’ of and all of whose activities he alone controls, and of selling the thing to a third party with the set purpose of keeping the thing out of the reach of the plaintiff, as I have found previously. But for these considerations, I would have ordered costs *de bonis propriis* against Chris Roets, the legal representatives of the second defendant.

[14] The aforegoing reasoning and conclusions are unaffected by the ‘Supplementary Note on behalf of Second Defendant’ that was served on the plaintiff’s legal representatives on 2 February 2012 (that is, after the sitting of the Court) and whose placement on the Court’s file the plaintiff’s legal representatives have objected to.

[15] In the result, I make the following order:

1. The abandonment of the action by the plaintiff on the merits (including the issue of estoppel) is hereby confirmed.

2. The second defendant must pay the plaintiff’s costs on the scale as between attorney (legal practitioner) and his or her own client up to 1 February 2012.

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PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF:

Adv. R Tötemeyer SC

Instructed by: Behrens & Pfeiffer

COUNSEL ON BEHALF OF THE SECOND DEFENDANT:

Adv. T Barnard

Instructed by: Chris Roets