REPUBLIC OF NAMIBIA NOT / REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 51/2013

In the matter between:

1.1.1.1.	**MARY-ANN MILJO N.O.**
	1st APPLICANT
CHARMAINE KATHRINE SCHULTZ N.O.	**2nd APPLICANT**
and	
MINISTER OF SAFETY AND SECURITY	**1st RESPONDENT**
WARRANT OFFICER SHIWEDA	**2nd RESPONDENT**
HESTER MARIA VAN ZYL	**3rd RESPONDENT**
LOUIS VAN ZYL	**4th RESPONDENT**

Neutral citation: *Miljo v Minister of Safety and Security (A 51/2013) [2013] NAHCMD 126 (17 May 2013)*

Coram: SCHIMMING-CHASE, AJ
Heard: 14 March 2013
Delivered: 17 May 2013

Flynote: Practice – Applications and Motions – Urgent applications – Law relating to interim interdicts and discretion of the court restated – Applicants applying on an urgent basis for an order preventing second respondent from

removing property from certain premises controlled by applicant in terms of a search and seizure warrant. Search warrant authorised on 26 February 2013, urgent application launched on 5 March 2013 after an aborted *ex parte* attempt by applicant on 28 February 2013. The applicants made out a case for urgency. The warrant authorised in terms of sections 20 and 21 of the Criminal Procedure Act, No 61 of 197, indicated that certain property was to be seized on the basis of reasonably held grounds for believing that the property will afford evidence as to the commission of a criminal offence. Although there is a great deal of acrimony between the parties and a dispute as to ownership of the property, it was clear *ex facie* the papers that no criminal offence was committed. The third and fourth respondents did not even lay charges against the applicants. In an attempt to obtain the return of their property, third and fourth respondents acted improperly.

Summary: The applicants launched an urgent application for a rule *nisi* calling upon the respondents to show cause why *inter alia* the second respondent and anybody acting on his behalf should not be prevented from removing certain movable property under the control and care of the second applicant pending the finalisation of a deceased estate. The rule *nisi* also called for an order directing the respondents not to interfere with the rights, title and interest of the first applicant as executrix of the deceased estate. Both orders were sought to operate as interim interdicts pending the return date. The applicants also applied for a rule *nisi* calling on the respondents to show cause why the third and fourth respondents should not be ordered to return any movable property of the deceased which they allegedly removed, and directing the deputy sheriff to take control of the aforesaid property.

The search warrant was issued on 26 February 2013. The urgent application was launched within a reasonable time, on 5 March 2013 after an earlier aborted attempt to apply for the same relief on an *ex parte* basis on 28 February 2013. The grounds for the issue of the search warrant were apparently that there was a reasonably held belief that the property would afford evidence as to the commission of an offence. On the papers there was no evidence of the commission of a criminal offence with regard to the taking into possession of

and storage of the movable property. This was done in terms of a court order in the applicants' favour granted in August 2011. The third and fourth respondents alleged in their papers that they applied for a search and seizure warrant because of financial constraints. Sections 20 and 21 of the Criminal Procedure Act make it clear that a search and seizure warrant can only be obtained if there are reasonably held grounds relating to the commission of a criminal offence. On third and fourth respondents' own version, that was not the case and the warrant was improperly obtained. The interim interdicts were granted. As regards the other relief sought to be finalised on the return date, the applicants failed in any meaningful way to identify or properly set out which property they wanted returned to the estate. In the result, this portion of the relief sought was dismissed.

ORDER

---

1. The second respondent and anybody acting on behalf of the second respondent is interdicted from removing any movable property under the care and control of the second applicant from Erf 218 and 219 Otavi, pending the finalisation of the estate of the late Louis Jacobus Miljo.

2. The third and fourth respondents are directed not to unlawfully interfere with the first applicant in her capacity as executrix in the administration of the estate of the late Louis Jacobus Miljo.

3. The relief sought in paragraphs 2.3 and 2.4 of the notice of motion is dismissed.

4. The third and fourth respondents are ordered to pay the costs of this application, such costs to include the costs of one instructing and one instructed legal practitioner.

JUDGMENT

SCHIMMING-CHASE, AJ

(b) This is an urgent application for the following relief:

"2. That a rule *nisi* be issued calling upon the respondents to show cause (if any) on a date and time to be determined by the Registrar of the above Honourable Court why an order should not be made in the following terms:

2.1 ordering and directing the second respondent or anybody acting under or on behalf of the second respondent from removing movable property under the control and care of the second applicant from Erf 218 and 219, Otavi pending the finalisation of the estate of the deceased;

2.2 ordering and directing the respondents not to interfere in any way with the rights, title and interest of the first applicant in her capacity as the duly appointed executrix in the estate of the late Louis Jacobus Miljo in the management and distribution of the said estate;

2.3 ordering and directing the third and fourth respondents to return any movable property of the late Louis Jacobus Miljo which they have removed from Plot 139A, Beperk, Klein Otavi to handing such property over to the second applicant or returning same to Plot 218 and 219, Otavi;

2.4 ordering and directing the deputy sheriff for the district of Otavi to take control of the property referred to in paragraph 2.3 above and to hand same over to the second applicant;

2.5 a costs order on a scale as between attorney and client.

3. That prayers 2.1 and 2.2 above shall operate as an interim interdict with immediate effect pending the return day of this Order."

(c) Before I deal with the merits of the matter a couple of issues are highlighted. The notice of motion initially sought an order that prayers 2.1 to 2.4 operate as an interim interdict with immediate effect, however after delivery of the answering affidavit on behalf of the third and fourth respondents, the applicants amended the notice of motion and sought an order that only paragraphs 2.1 and 2.2 operate as an interim interdict with immediate effect.

(d)

(e) This application was launched on 5 March 2013 and heard on 14 March 2013. No heads of argument were filed on behalf of any party. Although it is not a strict requirement that heads of argument be delivered in urgent applications, the assistance to the court of heads of argument, even if in the form of short submissions cannot be underscored enough. In addition, the papers were not paginated, and although the court had time to prepare the application, it was a frustrating and time consuming exercise to sift through the papers, which contained copies of earlier applications and voluminous annexures, to find documents referred to in the affidavits. In urgent applications the convenience of the court is taken into consideration and parties should be present to the importance of filing properly paginated papers.

(f)

(g) The parties to this application have a long and acrimonious history, aggravated by a love triangle between the first applicant, the deceased, the late Louis Jacobus Miljo and the third respondent. The first applicant is the duly appointed executrix and surviving spouse of the deceased who passed away on 31 July 2011. They were married to each other in community of property and the deceased did not leave a will.

(h) From about January 2005 the third respondent was romantically involved with the deceased and they lived together at the deceased's house in Otavi until his death. The first applicant resided in South Africa. It appears that the first applicant and the deceased were separated at the time, but no consideration is given to this issue in this judgment. The fourth respondent who deposed to the

answering papers is the third respondent's son. He alleged that both he and the third respondent also worked for the deceased during his lifetime in various capacities.

(i) Subsequent to the deceased's death there have been urgent applications launched on both sides against the other party. Both parties made serious allegations against the other, and accused each other of attempting to obtain ownership illegally of certain movable property. There is a clear dispute as to whether some of the property belongs to the estate, or whether the property is owned by the third and fourth respondents, who also allege that the first applicant is unnecessarily delaying the finalisation of the deceased's estate.

(j) This application concerns movable property in possession of the applicants situated at Erf 218 and 219 Otavi. The first applicant alleges that the property belongs to the deceased's estate and that she is in the process of administering the estate, hence the location of the property at one venue. The property was attached by the deputy sheriff and stored at Erf 218 and 219 Otavi subsequent to an urgent application launched by the applicants against the third and fourth respondents on or about 24 August 2011. In this application the applicants sought an order that the third and fourth respondents not remove or alienate any property belonging to the estate of the deceased and an order directing the deputy sheriff to attach a list of movable property. After a rule *nisi* was issued by this court on 24 August 2011, the property was attached by the deputy sheriff and taken to Erf 218 and 219 Otavi. This rule *nisi* was discharged on 26 October 2011. This is the property forming the subject matter of this application. I point out that the applicants also had a search warrant authorised and laid criminal charges against the third and fourth respondents during the abovementioned proceedings.

(k)

(l) On 27 April 2012, the third and fourth respondents launched an urgent application to stay the sale in execution of the above property on the basis that they were the rightful owners. The list of the property attached to the urgent application is almost identical to the list of property attached to the search and seizure warrant that is the basis of this application, except for a quad bike. This

application was postponed to 22 February 2013, after which it was withdrawn by the third and fourth respondents. Subsequent to the withdrawal of this application, the third and fourth respondents went to the police and had a search and seizure warrant authorised on 26 February 2013. This precipitated the launching of this application. I provide the above as background facts and some context. It was unfortunately a cumbersome exercise to deal with these facts, the necessary allegations not being made on the papers, but contained in the annexures. I do not propose in this judgment to go into detail on the acrimony between the parties or to deal with who owns what property, this not being what the court is called upon to adjudicate.

(m) The search and seizure warrant was authorised in terms of sections 20 and 21 of the Criminal Procedure Act, No 61 of 1977. *Ex facie* the warrant it is indicated that it appeared "on complaint made under oath that there are reasonable grounds for suspecting that there is … upon or at the premises situated at Workshop No 219 Motor and Truck Repairs and IWA 24/7 Workshop, Otavi, Grootfontein district … something in respect of which there are reasonable grounds for believing that it will afford evidence as to the commission of an offence." The warrant further directed the second respondent to *inter alia* search the premises and if found, to seize the property contained in the list attached to the warrant and to take it before a magistrate to be dealt with according to law.

(n) The third and fourth respondents in their answering papers alleged that due to their financial position, they were advised by a member of the Magistrate's office in Otavi and the Namibian police that the best way to obtain their property would be to apply for and obtain a search and seizure warrant and then to have the matter decided by a local magistrate. This is why the fourth respondent applied for a search warrant and why it was issued. To place this allegation in context, it will be recalled that the third and fourth respondents initially applied to stop a sale in execution by the applicants of the same property. The application was withdrawn on 22 February 2013 – because, according to the third and fourth respondents "the purpose of the application became academic once the sale of the third respondent's and my assets was stayed." Yet, they then proceeded to obtain the search and seizure warrant thereafter.

This is telling.

(o) Section 20 of the Criminal Procedure Act read with section 21 provides in essence that the State may seize anything

> (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within Namibia or elsewhere;
>
> (b) which may afford evidence of the commission or suspected commission of an offence, whether within Namibia or elsewhere; or
>
> (c) which is intended to be used in or is on reasonable grounds believed to be used in the commission of an offence.

(p) On the third and fourth respondents' own version the warrant was not obtained on the grounds upon which it was sought to be authorised in terms of the Criminal Procedure Act. The third and fourth respondents did not even lay criminal charges against the applicants. The conclusion cannot be escaped that the warrant was improperly obtained by the third and fourth respondents.

(q)

(r) It was argued on behalf of the third and fourth respondents that there was no urgency to the application because correspondence was transmitted by the Government Attorney, on behalf of the second respondent placing on record the fact that the second respondent had, before the institution of the application notified the parties that he had no intention of engaging in the conduct sought to be interdicted. In its notice of representation the Government Attorney also submitted that the first and second respondents do not intend to oppose the relief and would abide the decision of the court.

(s) However, it was submitted by Mr Nkiwane on behalf of the Government Attorney that although there would be no action on the search warrant, the undertaking would fall away if the interdictory relief is not granted. It was specifically submitted that in that instance, all bets would be off. In view of the

submission on behalf of the Government Attorney, the submission on behalf of the third and fourth respondents cannot be sustained. In my opinion, the application is urgent and was launched within a reasonable time after the warrant was authorised. There was an earlier application for the same relief on 1 March 2013, however it was not served on the respondents and was accordingly removed from the roll before it was launched again on 5 March 2013.

(t)

(u) The respondents also took the point that there is no annexure "A" attached to the founding papers and that annexure "A" was in actual fact the earlier *ex parte* application launched by the applicants referred to above. It was further submitted that as annexure "A", the *ex parte* application, was not attached to the notice of motion the missing documents are material to the application and it was accordingly fatally defective. The *ex parte* application is the same application, as this one except the respondents were not previously served. I don't see how a copy of the same application is material to the respondents. This submission is accordingly also devoid of merit.

(v) The rest of the opposition to the application is in essence that the applicants did not make out a case for the interdictory relief sought, in particular that the applicants failed to show the reasonable apprehension of irreparable harm and that there was no other satisfactory remedy open to them. It was conceded on behalf of the third and fourth respondents that the first applicant has a *prima facie* right as executrix of the deceased's estate and that she would have a well-grounded apprehension of irreparable harm with regard to loss of property where recovery is impossible or improbable. In this regard it was submitted that the removal of the goods to another place under the jurisdiction of the magistrate does not make recovery of the property impossible, as the first applicant would not lose her rights in the goods as they would be in safekeeping. It was also argued that the first applicant failed to point out why she could not pursue any other remedies, such as applying to set aside the warrant or to bring an application in the normal course. Reliance was placed on the legal principle that where another satisfactory remedy is available, the interdict should not be granted.

(w) I am not in agreement with these submissions. Firstly, the search and seizure warrant was improperly obtained for the reasons set out above. Secondly, the removal of the property was sought on the basis that the third and fourth respondents allege that they are its owners. In any event, the third and fourth respondents on their own papers alleged that due to the dispute of ownership of the property, they are in the course of preparing an action "which will be instituted in the very near future". The only thing that prevented the immediate issue of the summons was financial constraints. I also see no reason why the applicants should be forced to bring an application to set aside that warrant when they have brought an application to interdict the second respondent from acting on that warrant. Furthermore, it is clear from the submissions of the Government Attorney that should the interdict not be granted, they would proceed to act in terms of the warrant and remove the property.

(x) It is well established that the court has a discretion whether or not to grant an interdict and no comprehensive rule can be laid down for the exercise of the judicial discretion in granting or refusing interdicts. The court must decide on the circumstances of each case. The court's discretion is to be exercised judicially upon a consideration of all the facts. [1]

(y) An interdict will be granted if the court is satisfied that the applicant has a right established on a balance of probabilities and that the respondent has invaded it or threatens to do so. [2] Thus the applicant for an interlocutory interdict must show a right which is being infringed or which he or she apprehends will be infringed. It must be a legal right and it is also not necessary for the purpose of an interdict that the right for which the applicant claims protection, must be of pecuniary value. Furthermore, the requirements which an applicant for an interim interdict has to satisfy are not to be considered separately or in isolation

---

[1] Shoprite Namibia (Pty) Ltd v Paulo and another 2010(2) NR 475 (LC) at par 28 and the authorities collected there; Grobbelaar and another v Council of the Municipality of Walvis Bay and others 2007(1) NR 259 (HC).

[2] Webster v Mitchell 1948(1) SA 1186 (W) at 1188.

but in conjunction with one another to determine whether the court should exercise a discretion in favour of the relief sought. [3]

(z)

(aa) If the applicant can establish a clear right, his apprehension of irreparable harm need not be established. The original statement of this principle in Setlogelo v Setlogelo [4] reads as follows:

> "But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him where the right asserted by the applicant, though *prima facie* established, is open to some doubt. In such case he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party." [5]

(bb) This court has also accepted that the stronger the right is that an applicant proves, of lesser importance the other matters become. [6]

(cc) It is common cause that most if not all the property is stored at Erf 218 and 219 Otavi. The property stored there was obtained after the deputy sheriff attached same pursuant to the rule *nisi* issued in favour of the applicants on 24 August 2011. The respondents lay claim to ownership of that property. This is disputed by the applicant. The best way to deal with this dispute would be for the applicants to finalise the estate by preparing a liquidation and distribution account, and for the respondents to lay their claims against the estate, alternatively for them to institute the action that they state under oath they intend instituting. To instead follow the procedure of attempting to obtain a search and seizure warrant which is improper, clearly interferes with the right that the applicant has as executor of the deceased estate to have the property not illegally interfered with by any other person irrespective of who owns that

---

[3] Erasmus Superior Court Practice A8-9 and the authorities collected at footnote 1.

[4] 1914 AD 221 at 227

[5] See Erasmus Superior Court Practice *supra* E8-10 footnote 6 and the authorities collected there.

[6] Alpine Caterers Namibia (Pty) Ltd v Owen and others 1991 NR 310 (HC) at 313 H.

property. The third and fourth respondents were also mendacious in the information provided in support of the warrant.

(dd) To therefore argue that an application should instead be brought to set aside the warrant when the applicant has already commenced with these proceedings does not take the respondents' case any further. In fact it is otiose. I do not propose to deal in detail with the other requirements, the applicants having shown a clear right. In any event, the applicant does not have any other satisfactory remedy because it was made clear that the warrant would be acted upon if the relief was not granted.

(ee) As regards the balance of the relief sought, the applicants have been particularly sparse in their allegations that the third and fourth respondents are failing to hand over property to the applicant. The third and fourth respondents correctly pointed out that the property is not even identified or properly described in the founding papers. At the very least the first applicant must provide *prima facie* proof that the estate owns the property she seeks returned from the third and fourth respondents. In my view a case has not been made out for the relief sought in paragraphs 2.3 and 2.4 of the notice of motion.

(ff) The question remains whether the successful portion of the relief sought should be granted in the form of a rule *nisi.* Both parties argued their case in full before me and full papers were filed. As a result, it would be academic to grant a rule *nisi.* Effectively cause has been shown why the urgent interdictory relief should be granted. As regards the relief sought in paragraphs 2.3 and 2.4 of the notice of motion, the applicants have not succeeded on this aspect. However no real argument was devoted to this aspect during the hearing of this matter. In view of the fact that the applicants were successful with regard to the interdictory relief sought, I hold the view that as the successful party in these proceedings, the applicants are entitled to costs.

(gg) In light of the above the following order is made:

1. The second respondent and anybody acting on behalf of the

second respondent is interdicted from removing any movable property under the care and control of the second applicant from Erf 218 and 219 Otavi, pending the finalisation of the estate of the late Louis Jacobus Miljo.

2. The third and fourth respondents are directed not to unlawfully interfere with the first applicant in her capacity as executrix in the administration of the estate of the late Louis Jacobus Miljo.

3. The relief sought in paragraphs 2.3 and 2.4 of the notice of motion is dismissed.

4. The third and fourth respondents are ordered to pay the costs of this application, such costs to include the costs of one instructing and one instructed legal practitioner.

_____

E SCHIMMING-CHASE

Acting Judge

APPEARANCES

APPLICANTS:	S Rukoro Instructed by Petherbridge Law Chambers
FIRST AND SECOND RESPONDENTS:	S Nkiwane Government Attorney
THIRD and FOURTH DEFENDANTS:	T Wylie Instructed by Erasmus & Associates