

IN THE HIGH COURT OF

NAMIBIA



JUDGMENT

Case no: I 121/2012

In the matter between

THE ACTING DEPUTY SHERIFF OF WINDHOEK

APPLICANT

and

**CHRYSTAL D MOUTON
GESELLSCHAFT FÜR INTERNATIONALE
ZUSAMMENARBEIT(GIZ) GmbH**

1ST CLAIMANT

2ND CLAIMANT

*Neutral citation: The Deputy Sheriff of Windhoek v Mouton & Another (I 121/2012)
[2013] NAHCMD 208 (17 April 2013)*

Coram: Smuts, J

Heard on: 17 April 2013

Delivered on: 17 April 2013

Flynote: Interpleader claim dismissed

ORDER

The first claimant's claim is dismissed. No order as to costs.

JUDGMENT

SMUTS, J

[1] This is a very sad and unfortunate case which I am called upon to deal with today I have before me a claimant who claims a right to certain items that have been attached by the Deputy Sheriff. The claim comes before me by way of interpleader proceedings.

[2] The first claimant is the mother of the judgment debtor. She and her husband had assisted their daughter through financial and other difficulties which their daughter had encountered. Her husband first paid the sum of N\$30 000 for legal fees for their daughter in 2008 and the first claimant made a further payment in respect of her daughter's bail in 2011. Her husband had taken the position, quite understandably, that their daughter should not merely receive from them but would also need to provide something in exchange for the money which had been provided to her to deal with difficulties she had encountered. The first claimant said that this related to the sale of the attached furniture to her and her husband but that she and her husband would not take delivery of the items because there was no space at their place for the furniture and that these items would still be needed by their daughter.

[3] The first claimant acknowledged that the first payment in 2008 was made by her husband and not by her.

[4] The second claimant, the judgment creditor has taken the point that any claim in respect of the first N\$30 000 which had been advanced which gave rise to the alleged sale would be a claim of her husband not her own. They were after all married out of community of property and they have separate estates. That point is sound. The claim in question should have been brought by her husband. For this reason alone the claim thus cannot be sustained and must be dismissed.

[5] I also want to point out however that, as I understood the evidence of first claimant, the requisites for a valid sale would in any event not appear to have been met. There had after all been no delivery of the items in question, especially in view of the fact that this purported sale had occurred some 4 years before the judicial attachment.

It would rather appear that there was some form of security understandably demanded by the parents from their daughter for whom they had paid out their savings to assist her in a time of need. But as was pointed out by Mr Jones, who appears for the second claimant, the requisites for a valid pledge had not been met because delivery would be required which had not occurred.

[6] It would follow that even if the claimant's husband himself would have brought the claim, it was fraught with difficulty and would also be unsustainable by reason of the lack of any delivery. I reach this conclusion in applying the legal principles in question, although having some appreciation for the difficult circumstances in which the first claimant and her husband are at present. She testified that her husband is currently infirm and suffers from a chronic condition. That is why he is not the claimant or before Court and could not give testimony. They had made use of their own savings in seeking to assist their daughter in the way she sketched in her evidence. I do however have a discretion as far as costs are concerned. This is an interpleader action where the first claimant considered that she had security (over the furniture provided by her daughter) which could be enforceable against the judgment creditor who had made an attachment. Unfortunately for her, it is not enforceable. When the judicial process had set in and there was an attachment, then a claim of this kind, even if it were made by first claimant's husband, would not on the evidence before me be enforceable. In this interpleader proceeding the first claimant sought to advance and protect that right, but has been successful. But in view of all the circumstances that have come before me today, I would in the exercise in my discretion not further burden the first claimant with an adverse order as to costs.

[7] I accordingly dismiss the first claimant's claim brought by way of interpleader proceedings but do not make any order as to costs against the first claimant.

DF SMUTS

APPEARANCE

PLAINTIFF:

C. J. Van Zyl
Instructed by Delport Attorneys

DEFENDANT:

A.J.B. Small
Instructed by Dr Weder, Kauta & Hoveka Inc.