



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 163/2014

In the matter between:

CHRISTOFFEL JOHANNES LABUSCHAGNE

APPLICANT

And

RUI GAERDES

FIRST RESPONDENT

F.W.A.S PRESTACAO DE SERVICOS LDA

SECOND RESPONDENT

Neutral citation: *Labuschagne v Gaerdes* (A 63/2014) [2014] NAHCMD 277 (22 September 2014)

Coram: HOFF, J

Heard: 01 September 2014

Delivered: 22 September 2014

ORDER

1. *The rule nisi* is hereby confirmed.
 2. Costs to stand over for determination in the main application.
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JUDGMENT

HOFF, J

[1] The applicant, an *incola*, approached this Court on an urgent and *ex parte* basis for an order *ad fundandam jurisdictionem* alternatively *ad confirmandam jurisdictionem* in respect of certain movable property of the respondents who are both peregrine of this Court. The applicant sought the attachment of a number of commercial vehicles of the respondents parked at the Oshikango border post in Northern Namibia.

[2] On 02 July 2014 this Court granted the applicant a temporary interdict authorising the attachment of afore-mentioned movable property. On 1 August 2014 the *rule nisi* issued by this Court on 2 July 2014 was extended to 15 August 2014 by agreement between the parties. The respondents were legally represented at that stage.

[3] On 13 August 2014 the respondents filed opposing affidavits and on 15 August 2014 the *rule nisi* was again extended to 20 August 2014 in order to afford the applicant the opportunity to file replying papers which papers were filed on 20 August 2014. On 20 August 2014 the matter was set down for hearing on 1 September 2014 and the *rule nisi* was extended to the same date.

[4] The applicant in his founding affidavit stated that he is the owner of a Scania truck tractor (VIN number, engine number and registration number provided) as well as two semi trailers (VIN numbers, register numbers and registration numbers provided). His father Jan Hendrik Basson Labuschagne is employed by him and resides in Oshikango. About 8 April 2014 the aforementioned Scania truck tractor (and trailers) suffered a breakdown in Luanda, in the Republic of Angola. Arrangements were made for a mechanic to fly to Luanda from Windhoek in order to see to the repairs of the truck.

[5] About 17 April 2014 the first respondent, representing the second respondent, telephonically contacted him and expressed his desire to purchase the said Scania truck and trailers. The applicant and first respondent agreed that second respondent would purchase the truck and trailers from the applicant for the sum of N\$ 330 000.00. The applicant stated that it was agreed that second respondent would take immediate delivery of the truck and trailers in Luanda and that the respondents would pay the purchase price in cash, in Oshikango by way of the following instalments:

N\$ 150 000.00 on 21 April 2014

N\$ 150 000.00 on 25 April 2014

N\$ 30 000.00 on 28 April 2014

An invoice was subsequently rendered to the second respondent.

[6] The applicant stated that on 28 April 2014 the first respondent informed him that he experienced some difficulty in obtaining the necessary funds from his bank in Angola and promised to make the full payment by 5 May 2014. The applicant acceded to this arrangement. It appears from the founding affidavit that the applicant never received any payments from the second respondent.

[7] In his answering affidavit the first respondent claimed an improper use of the *ex parte* procedure *inter alia* by not making full disclosure of all the relevant facts and claiming that the applicant lacks the necessary *locus standi* to bring this application,

averring that the applicant is not the owner of the Scania truck and semi-trailers. The first respondent stated that the said truck and trailers belong to a certain Mr Johan Burger form Otjiwarongo.

[8] The first respondent avers that a certain Mr. Jan Hendrik Basson Labuschagne (apparently the father of the applicant) had informed first respondent at Oshikango that he was the owner of afore-mentioned truck which had broken down at the market in Luanda and which truck was abandoned by the driver. He was requested on his return to Luanda to investigate the matter. He subsequently found the truck and trailers in Luanda and reported back to Mr. Jan Hendrik Basso Labuschagne who in turn requested him to park the vehicles at his business premise in Luanda which he did. Thereafter on his return to Oshikango he requested Mr. Jan Hendrik Basson Labuschagne (through an interpreter) to purchase the necessary parts to have the truck repaired in order for it to be driven back to Namibia.

[9] It was at this stage that M.r Jan Hendrik Basson Labuschagne requested him to find a buyer for the truck and trailers and he then expressed an interest in buying the vehicles. It was agreed on a purchase price of U\$ 33 000.00 to be paid once Mr. Jan Hendrik Basson Labuschagne had supplied him with the original registration and ownership documents in respect of the truck and the two trailers. Fist respondent stated that at no time was he informed that the said truck and trailers were being sold on behalf of a third party.

[10] The documentation requested by first respondent were never provided and he subsequently informed Mr. Jan Hendrik Basson Labuschagne that he was no longer interested in purchasing the truck and two trailers and requested him to remove the vehicles from his business premises in Luanda, Angola. This was subsequently done and the Scania truck was brought back to Namibia on a trailer, seeing that the truck was not in a running condition.

[11] At the Oshikango border the truck was confiscated by a private investigator acting on behalf of Mr. Johan Burger and towed to Otjiwarongo. The first respondent denied that he had any dealings with the applicant and denied that he or the second respondent had ever received an invoice form the applicant in connection with a purchase of the afore-mentioned motor vehicles.

[12] In an confirmatory affidavit Johan Burger stated that he is the lawful owner of the Scania truck tractor and that during December 2013 he sold the said truck to the applicant for the purchase price of N\$ 120 000.000 on condition that the applicant would be responsible for the repairs to the diesel pump which was inoperative at that time. It was a further term of the oral agreement that payment of the truck would be made by the applicant within a reasonable time, alternatively upon demand at which time Burger would co-operate and facilitate the transfer and registration of the truck into the name of the applicant.

[13] During December 2013 the applicant took delivery of the Scania truck. According to Burger the applicant failed to pay the purchase price within a reasonable time, alternatively on demand and has remained in default of so paying, to date. Burger stated that since the truck is fitted with satellite tracking he was aware that the applicant had removed the vehicle to the Republic of Angola. Consequently, during July 2014 he opened a criminal case of theft against the applicant at Otjiwarongo.

[14] Burger stated that he subsequently became aware that the truck was returned to Namibia and was standing at Oshikanto border post. The truck was subsequently removed from Oshikango border post by a private investigator on his instructions and towed back to Otjiwarongo, where it presently stands awaiting repairs. This Court heard submissions on two points raised *in limine* (i.e the claim of the abuse of the *ex parte* procedure and apparent lack of *locus standi* by the applicant) together with the merits of the application.

[15] Ms. Visser who appeared on behalf of the respondents submitted in respect of the first point *in limine* (abuse of *ex parte* procedure) that it is trite law that where a party brings an *ex parte* application a litigant must be frank with the Court and make out his or her case in the founding affidavit. It was submitted that in respect of the ownership of the vehicles the applicant failed to disclose material information regarding applicant's alleged ownership of the vehicles in order to obtain a tactical advantage in the form of interim relief without the respondents being afforded to opportunity to be heard.

[16] In respect of the second point *in limine* namely that the applicant had no *locus standi in judicio*, it was submitted that the applicant was not the owner of the Scania truck at the time of the alleged sale to the applicant, since Mr. Johan Burger was the lawful and registered owner at the relevant time. It was submitted that the applicant for this reason could not have sold the truck to the respondents since a seller who is not the owner of the property sold cannot transfer ownership.

[17] Ms. Visser submitted that the applicant may not in his replying affidavit establish what he should have done in the founding affidavit in respect of the issue of ownership of the vehicles. It was submitted that the applicant approached this Court with unclean hands and that in the circumstances this Court should refuse to grant any relief to the applicant. In this regard it must be stated with regard to the two trailers that the applicant in his replying affidavit admitted that the registration numbers listed in his founding affidavit are not the registration numbers of the two trailers but that he had affixed those registration numbers in order to utilize the trailers.

[18] The applicant however insisted that he is the owner of the two trailers even though the trailers had not yet been registered in his name. Reference was also made by Ms Visser to certain provisions of the Road Traffic and Transportation Act, Act 22 of 1999 which criminalises certain conduct in particular s 85 which inter alia prohibits the falsifying or counterfeiting, or substitution or alteration with intent to

deceive, any licence number or licence mark or certificate or licence or the use of a certificate or licence issued in terms of the Road Traffic and Transportation Act of which such a person is not the holder, or permit such a licence or certificate to be used by another person. It was submitted that the applicant was dishonest when he approached this Court since his claim is based on ownership and ought to have informed this Court the basis of his ownership.

[19] Mr. Strydom who appeared on behalf of the applicant in respect of the allegation of the abuse of the *ex parte* procedure correctly submitted that it is trite law that all attachment cases are usually brought on an *ex parte* basis because it is firstly a preliminary issue, and secondly if the applicant had given notice of this application nothing would have prevented the first respondent from removing the vehicles and cross the border into Angola, and thirdly to give effect to the doctrine of effectiveness since if the respondents had consented to the jurisdiction of this Court it would have undermined this doctrine of effectiveness.

[20] In respect of the issue of ownership it was submitted by Mr. Strydom that registration is not conclusive proof of ownership eg. motorvehicles purchased by means of instalment sales agreements through commercial banks. It was further submitted that a Mr. Johan Burger in a confirmatory affidavit confirmed selling the Scania truck tractor to the applicant only on condition that the applicant repairs the truck and that in terms of this agreement there was no reservation of ownership. It was further submitted that the agreement of sale with Mr. Burger was credit sale agreement and that ownership of the Scania truck passed to the applicant on delivery of the truck during December 2013 and not at the time of payment.

[21] An applicant needs to prove in an application such as the present one that the applicant is an *incola* of this Court and that the respondent is a *peregrinus*, secondly that the applicant has a *prima facie* case and thirdly that the property to be attached belongs to the respondent. It is common cause that the applicant is an *incola* and

that the respondents are *peregrine* and it is also not disputed that the property to be attached belong to the respondents.

[22] In respect of the requirement of a *prima facie* case this Court was referred to the case of *Bulter v Banimar Shipping Co SA* 1978 (4) SA (SECLD) 753 where Howie AJ stated the following on 757 – f:

“ In the first place, leaving the aside the question of ownership of the goods sought to be attached, the burden on an applicant for attachment to found jurisdiction is not to prove his case on a balance of probabilities but only to do so on a *prima facie* basis: *Bradbury Gretorex C (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W) at 533 C –E; *Yorigami Maritime Construction Co Ltd v Nissho – Iwai Co Ltd* 1977 (4) SA 682 © at 687 *infine*; *Itraltrafo SpA v Electrical Supply Commission* 1978 (2) SA 705 (W) at 709 A. These cases show that the term *prima facie* as applied in this sort of case bears a meaning different from that which it is commonly known to bear in other contexts. It means here that the applicant must tender evidence which, if accepted, will establish a cause of action - the fact that such evidence is in dispute does not disentitle the applicant to the desired attachment.”

and continues at 759 as follows:

“Apart from that on the authorities one is in any event not entitled to go into the merits at this juncture.”

In the case of *Hülse-Reuter and Others v Gödde* 2001 (4) SA 1336 (SCA) at 1343 G-H Scott JA stated the following in respect of the issue of an application for attachment to found or to confirm jurisdiction:

“One of the considerations justifying what has been described as generally speaking a low-level test is that the primary object of an attachment is to establish jurisdiction,

once that is done the case of action will in due course have to be established in accordance with the ordinary standard of proof in subsequent proceedings.”

[23] The dispute about the ownership of the Scania truck and trailers is in view of the afore-mentioned authorities not to be decided in this application, and I need not express any views in regard thereto. Similarly the averment of applicant approaching this Court with unclean hands is an issue to be decided in the main action (still to be instituted). I am satisfied that the applicant has proven the elements which would entitle him to the confirmation of the *rule nisi* pending the outcome of the main action to be instituted by the applicant.

[24] In the result the following orders are made:

1. The *rule nisi* is hereby confirmed.
2. Costs to stand over for determination in the main application.

Hoff J
Judge

Appearances:

For applicant: DELPORT-NEDERLOF ATTORNEYS

For respondent: DR. WEDER, KAUTA & HOVEKA INC.

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