



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 836/2014

In the matter between:

THE DEPUTY SHERIFF OF WALVIS BAY

APPLICANT

and

**GUNNAR JENSEN ACTING IN HIS CAPACITY AS A
TRUSTEE OF THE GUNNAR JENSEN BUILDING
MATERIALS TRUST T/A PENNYPINCHERS TIMBERCITY
WINDHOEK**

FIRST CLAIMANT

and

**MARCELS ELECTRONIC TECHNOLOGY CC &
FABIAN MARCEL**

SECOND CLAIMANT

Neutral citation: *The Deputy Sheriff of Walvis Bay v Gunnar Jensen acting in his capacity as a Trustee of the Gunnar Jensen Building Materials Trust t/a Pennypinchers Timbercity Windhoek (I 836/2014)* [2019] NAHCMD 193 (12 June 2019)

Coram: ANGULA DJP

Heard: 28 March 2019

Delivered: 12 June 2019

Flynote: Rule 113(9) – Interpleader – Second claimant not being a party to the previous interpleader proceedings not barred – No knowledge of previous interpleader proceeding – Previous interpleader notice not served on him – Second claimant proved his ownership in the Nissan bakkie.

Summary: This is an interpleader arose from the execution of a judgment debt – Interpleader proceedings were instituted previously in respect of the execution of the same judgment debt – Mrs Schoonbee (a claimant in those proceedings) was dismissed by an order of court – The court further ordered that she together with those claiming under her were barred from making any claim against the property under attachment – Thereafter a second interpleader proceedings were issued – The first and the second claimants filed claims in respect of a bakkie which was under attachment – It was argued on behalf of the first claimant that second claimant was barred from claiming in this proceedings as he was aware of the first dismissed proceedings in that he gave the original registration documents to the Deputy Sheriff to prove his ownership in the bakkie – The second claimant testified under oath that he was not aware of the first interpleader proceedings and that he was not a party to those proceedings – His evidence was not disputed.

Held, a person is only a party to an interpleader once notified and served with the interpleader notice and called upon to file his or her notice of intention to file particulars of claim and then files such particulars of claim.

Held, second claimant was not notified of the first interpleader proceedings, nor was he called upon to file his notice of intention to file particulars of claim and for that reason he was not barred from participating in the current proceedings.

Held, second claimant has proven his ownership in the Nissan bakkie.

ORDER

1. The applicant (Deputy Sheriff) is ordered to releases the Nissan bakkie NP300 Hardbody Pick-up, VIN ADNADGD22Z0029164, engine number KA24891285Z, registration number N20400WB from the attachment into the hands of its lawful owner, the second claimant.
2. The first claimant is order to pay the second claimants costs.
3. The matter is removed from the roll and considered finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1]This is an interpleader which arose from the execution of a judgment debt by Gunnar Jensen Acting in his capacity as a Trustee of the Gunnar Jensen Building Materials Trust t/a Pennypinchers Timbercity Windhoek against Nam Interior Wood Works CC, the first defendant and Dries Jacobus Schoonbee, the second defendant. These parties will be referred to as judgment debtors. Gunnar Jensen Building will be referred to as the first claimant and Marcell Electronic Technology CC and Mr Fabian Marcel will be jointly referred as the second claimant.

[2] The applicant is Mr Andre Visser, a major male person and being the Deputy Sheriff for the District of Walvis Bay, with his offices situated at No. 43, Moses Garoeb Street, Walvis Bay.

[3] The first claimant is Gunnar Jensen Acting in his capacity as Co-Trustee of the Gunnar Jensen Building Materials Trust t/a Pennypinchers Timbercity at Windhoek.

[4] The second claimant is Marcell Electronic Technology CC and Fabian Marcel, herein after jointly referred to as the second claimant.

[5] The first execution debtor is Nam Interior Wood Works CC, a Close Corporation, registered in terms of the applicable law in this Republic, with its principal place of business situated at care of No. 56, Esplanade Road, Walvis Bay, whose full and further particulars are unknown to the second claimant.

[6] The second execution debtor is Dries Jacobus Schoonbee, a major male person, with his address situated at No. 56, Esplanade Road, Walvis Bay.

Brief background

[7] On 13 May 2014 a writ of execution was issued against the judgment debtors movable properties and on 23 March 2017, in execution of the writ, the Deputy Sheriff of Windhoek attached and took under his control certain goods, including the Nissan bakkie with the registration number N20400WB, being the subject matter of dispute in this interpleader proceedings.

[8] During October 2017, the Deputy Sheriff of Walvis Bay instituted interpleader proceedings, in which the plaintiff (judgment creditor) and a certain Mrs Carla Schoonbee were the first and second claimants in that matter. Marcells Electronic Technology CC was not a party to those interpleader proceedings.

[9] On 9 November 2019, this court dismissed Mrs Carla Schoonbee's claim and made an order that she together with all persons claiming under her were barred, as against the applicant and the plaintiff/first claimant (Gunner Jensen t/a Pennypinchers), from making any claim in respect of the attached goods.

[10] During July 2018, the Deputy Sheriff yet again served an interpleader notice on the judgment debtors and on Marcells Electronic Technology CC. On 3 August 2018, the applicant withdrew that interpleader proceedings and it was accordingly removed from the roll.

[11] On 13 November, the current interpleader notice was filed and the judgment creditor, who is currently the first claimant, and Marcells Electronic Technology CC,

who is the second claimant in this matter filed their particulars of claim. When the matter was called, Ms Delport, who appeared for the second claimant, made an application for leave to call Mr Fabian Marcel as a witness to give evidence regarding the ownership of the said attached Nissan bakkie. Mr van Vuuren, who appeared for the first claimant, objected to Ms Delport's application. I then set the matter down for arguments on whether oral evidence should be led. Having heard the counsels' submissions, I ruled that Mr Fabian Marcel be called to give oral evidence.

[12] After Mr Fabian Marcel testified with regard to ownership of the Nissan bakkie and Mr van Vuuren conceded that a case has been made out that the Nissan bakkie belongs to the first claimant.

[13] However, Mr van Vuuren raised another point to the effect that, in the previous interpleaders proceedings filed, an order was made on 9 November 2017, in terms whereof Mrs Carla Schoonbee and all persons claiming under her, were barred, as against the applicant and the plaintiff/first claimant, from making any claim in respect of the attached goods.

[14] To buttress his point Mr van Vuuren, argued that the order which barred Mrs Schoonbee and all persons claiming under her was still effective and the second claimant in these proceedings has not sought an order to set aside that order and as a result, that order still stands until it is set aside, therefore the second claimant was barred in respect of this proceedings. Counsel further argued that, although the second claimant was not a party to those proceedings, he was aware of them and in fact testified that he gave the original Natis registration document of the Nissan bakkie to Mr Schoonbee to whom he had lend the bakkie, to prove that the second claimant is the owner of the bakkie. Mr van Vuuren submitted further that, that act alone showed that the second claimant wanted to prove ownership of the attached Nissan bakkie and as a result, he fell under 'all persons' who were barred as against the applicant, from making claims in respect of the attached Nissan bakkie, whether he was a party or not to those proceedings, his intention of giving the bakkie's registration certificate was to prove ownership.

[15] Mr van Vuuren further submitted that the court does not have to decide who the owner of the Nissan bakkie under attachment is, but the court is still obliged make an order barring the persons who were claiming ownership of the bakkie, whether directly or indirectly from making such claims. In supporting his submission, Counsel argued states that the purpose of this is to avoid repeated claims in regard to an item which is under attachment and to ensure that there is efficient procedure that follows through the execution of a judgment of this court.

[16] Ms Delpont argues contrariwise and submitted that when the Deputy Sheriff filed the interpleader in 2017, he only served it on one claimant, Mrs Carla Schoonbee. The second claimant was not a party and was not notified of those proceedings. Counsel further pointed out that the second claimant had testified that the second judgment debtor informed him that the bakkie had been attached and because of that, the second claimant furnished the judgment debtor with the registration documents of the bakkie and told the judgment debtor to sort it out. It was only after the second claimant saw the sale of the bakkie being advertised in the newspaper, that he approached the Deputy Sheriff and was informed that he must consult a lawyer.

[17] Ms Delpont submitted that the second claimant was never informed of the proceedings or that an interpleader was instituted, and neither was he called upon to file particulars of claim. Ms Delpont submitted further that when one looks at rule 113(9), it states that if a claimant to whom an interpleader notice and affidavit have been duly delivered, fails to deliver particulars of claim within the time stipulated, or having delivered the particulars of claim, fails to appear in court, the court may make an order barring him or her or all persons claiming under him or her. She points out that emphasis is on the notification issue, which is fundamental.

[18] Ms Delpont further went on and stated that the term 'and all persons claiming under him or her' in rule 132(9), must establish some sort of legal nexus between the claimant and persons claiming under him or her. In this connection counsel submitted that there was no link or legal connections between the second claimant and Mrs Schoonbee, besides the fact that the bakkie was found in the judgement debtor's possession and that the second claimant gave him the registration

documents for him to sort out the issue of attachment. Therefore, Counsel submitted, that there must be a legal nexus, giving the person claiming under the other one a right to do so. In other words a person must be a party to the proceedings in order to be able to be barred.

Legal principles

[19] Rule 113 reads as follows:

'Interpleader

113. ...

(3) Where subrule (1) applies the applicant may deliver on Form 27 a notice called an 'Interpleader notice' to the claimants.

(4) Where the claims relate to money the applicant is required, on delivering the notice mentioned in subrule (3), to pay the money to the registrar who must hold it until the conflicting claims have been decided.

(5) Where the claims relate to a thing capable of delivery the applicant must tender the subject matter to the registrar when delivering the interpleader notice or take such steps as are necessary and required to secure the availability of the thing in question as the registrar may direct.

(6) Where the conflicting claims relate to immovable property the applicant must place the title deeds thereof, if available to him or her, in the possession of the registrar when delivering the interpleader notice and must at the same time hand to the registrar an undertaking to sign all documents necessary to effect transfer of the immovable property in accordance with an order which the court may make or in terms of an agreement of the claimants.

(7) The interpleader notice must -

- (a) state the nature of the liability and the nature of the property claimed which form the subject matter of the dispute;

- (b) call on the claimants to give notice, in writing, within five days of service of the interpleader notice on them, of their intention to deliver particulars of claim in regard to the subject matter of the dispute and in such notice to appoint an address within a flexible radius of the office of the registrar at which they will accept notice and service of all documents;
 - (c) call on the claimants within the time stated in the notice, not being less than 14 days from the date of service of the notice, to deliver particulars of their claims; and
 - (d) state that on a further date, not being less than 15 days from the date specified in the notice for the delivery of claims, the applicant will apply to court for its decision as to his or her liability or the validity of the respective claims on which hearing date the claimants are also called upon to appear in support of their claims.
- (8) The applicant must deliver together with the interpleader notice an affidavit stating that he or she -
- (a) claims no interest in the subject matter in dispute other than for charges and costs;
 - (b) does not collude with any of the claimants;
 - (c) is willing to deal with or act in regard to the subject-matter of the dispute as the court may direct.
- (9) If a claimant to whom an interpleader notice and affidavit have been duly delivered –
- (a) fails to deliver particulars of his or her claim within the time stated; or
 - (b) having delivered such particulars, fails to appear in court in support of his or her claim, the court may make an order declaring him or her and all persons claiming under him or her barred as against the applicant from making any claim on the subject matter of the dispute.

(10) If a claimant delivers particulars of his or her claim and appears before it, the court may -

- (a) then and there adjudicate on each claim after hearing such evidence as it thinks fit;
- (b) order that a claimant be made a defendant in an action already commenced in respect of the subject matter in dispute in place of or in addition to the applicant;
- (c) order that an issue between the claimants be stated by way of a special case or otherwise and tried and for that purpose order which claimant is the plaintiff and which is defendant; or
- (d) if it considers that the matter is not a proper matter for relief by way of interpleader notice, dismiss the application; and
- (e) make such order as to costs and the expenses, if any, incurred by the applicant under subrule (5) as the court considers fair and reasonable.

(11) If an interpleader notice is issued by a defendant in an action, proceedings in that action must be stayed pending a decision on the interpleader, unless the court on an application made by any other party to the action orders otherwise.'

Application of the law to the facts

[20] In terms of Rule 113, it is clear that the Deputy Sheriff acting as the applicant in interpleaders must give the claimants notice. The rule even goes further in rule 113(7) to explain what must be contained in that notice, and what the claimants who receive such notice are expected to do. If the claimants who are notified, so to say, who receive such notice fail to do what is expected of them in terms of this rule, then rule 113(9) kicks in. The sub-rule provides that if a claimant to whom an interpleader notice and affidavit have been duly delivered fails to deliver particulars of his or her claim within or having delivered such particulars, fails to appear in court in support of his or her claim, the court may make an order declaring him or her and all persons claiming under him or her barred as against the applicant from making any claim on the subject matter of the dispute.

[21] When carefully consider rule 113, it is unequivocal stipulates that a party who has received notice, and who has been served with the interpleader notice and who is aware of the proceedings because of being served with the notice fails to do what is stipulated in 113(9)(a) or (b), then the court may bar him or her and all persons claiming under him or her as against making any claim. Therefore the person who is barred must have received notice and must have been notified to give notice of filing his or her particulars of claim. The person can only be barred if he or she failed to do so.

[22] In the present matter, it appears that two interpleaders proceedings were issued, prior to the current proceedings were filed. The previous proceedings were dismissed and removed from the roll. In the said previous proceedings, the first claimant and Mrs Carla Schoonbee were the only claimants and were served with the notice of the interpleader by the Deputy Sheriff. The second claimant was not notified by the Deputy Sheriff of the interpleader proceedings, neither was he notified to give his notice of intention to file his particulars of claim nor was he called upon to file his particulars of claim. I am therefore of the considered view that, he was not a party to those proceedings.

[23] The second claimant testified that he was informed by Mr Schoonbee that the Nissan bakkie had been attached for sale in execution, then he gave his registration documents in respect of the bakkie to Mr Schoonbee so that the latter could sort it out because the bakkie did not belong to Mr Schoonbee but to the second claimant. The second claimant further testified that he was not aware of the interpleader proceedings neither was he served with any papers. He testified that he only became aware of the proceedings when he saw the bakkie being advertised in the newspaper sometime in January 2018 and only then did he went to the Deputy Sheriff to enquire about his bakkie, and was informed that there were execution proceedings to sell the bakkie. He further testified that by the time the order barring Mrs Schoonbee was made, the second claimant was unaware that there were interpleader proceedings before court or that he was expected to appear to prove his ownership in the bakkie.

[24] I therefore do not agree with the submission by Mr van Vuuren that because the second claimant gave registration documents of the Nissan bakkie to Mr Schoonbee, that he was proving ownership and therefore the order barring Mrs Schoonbee applied to the second claimant. There is no legal connection between the second claimant and Mrs Schoonbee. I say this for the following reasons: the undisputed evidence before court is that the bakkie was made available for use by the second claimant to Mr Schoonbee and not to Mrs Schoonbee. After the bakkie was attached the second claimant delivered the bakkie's registration documents to Mr Schoonbee and not to Mrs Schoonbee. Mrs Schoonbee was not the one who was handed the bakkie's registration document. She also did not attempt to prove that the bakkie belong to the second claimant. Therefore the second claimant did not in any way claim under Mrs Schoonbee the bakkie while under custody and control of Mr Schoonbee.

[25] In the result, I find that a person (juristic or natural) is a party to an interpleader once he or she has been notified and served with the interpleader notice, calling upon him or her to file the notice of intention to file particulars of claim and then filing the particulars of claim, only then such person can be said to be a party to those proceedings. An order made against parties to interpleader proceedings barring them, cannot affect a person who was not a party to those proceedings. Moreover, the second claimant in this matter, has satisfactorily proved his ownership in the bakkie, which fact has been conceded to by the first claimant. I am satisfied that second claimant has succeeded in proving his ownership in the bakkie. I cannot see any reason why the normal rule that costs follow the results should not apply in this matter. In my judgment the second claimant is entitle to be compensated for his costs.

[26] As a result, I make the following order:

1. The applicant (Deputy Sheriff) is ordered to releases the Nissan bakkie NP300 Hardbody Pick-up, VIN ADNADGD22Z0029164, engine number KA24891285Z, registration number N20400WB from the attachment into the hands of its lawful owner the second claimant.

2. The first claimant is order to pay the second claimants costs.
3. The matter is removed from the roll and considered finalized.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANT:

A VISSER

The Deputy Sheriff of Walvis Bay

FIRST CLAIMANT:

A VAN VUUREN

Instructed by Behrens & Pfeiffer, Windhoek

SECOND CLAIMANT:

A DELPORT

Of Delport Legal Practitioners, Windhoek