

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**RULING**

Case No: HC-MD-CIV-ACT-CON-2019/04543

INT-HC-INTERP-2020/00241

In the matter between:

**THE DEPUTY SHERIFF OF TSUMEB MR. J.A PULESTON**

**APPLICANT**

and

**MOTOVAC NAMIBIA (PTY) LTD**

**FIRST CLAIMANT**

**GROBLER FAMILY TRUST**

**SECOND CLAIMANT**

**Neutral Citation:** *Deputy Sheriff of Tsumeb v Motovac Namibia (Pty) Ltd* (HC-MD-CIV-ACT-CON-2019/04543-INT-HC-INTERP-2020-00241) [2021] NAHCMD 127 (25 March 2021)

**CORAM:** SIBEYA J

**Heard:** 17 March 2021

**Delivered:** 25 March 2021

**Flynote:** Practice – Interpleader – Second claimant submitting that assets attached by Deputy Sheriff form part of a list of donated assets to a trust and cannot be attached and should be released from judicial attachment – Transfer by *Constitutum possessorium* is sufficient for change of ownership of property – Court finding no qualms over assets identified as being donated therefore ordering that only such assets be released from attachment.

**Summary:** The interpleader involved a claim wherein the second claimant submitted that assets attached by the Deputy Sheriff to satisfy a default judgment granted in favour of the first claimant were donated to second claimant (a trust) and therefore cannot be attached.

*Held* that – although the properties donated to the donee remained with the donor transfer thereof occurred by *Constitutum possessorium* and there was constructive delivery of the properties to the donee.

*Held* further that – the properties so transferred to the donee are *de jure* owned by the second claimant and must be released from attachment.

*Held* further that – the lack of due diligence in keeping the records contributed immensely to the litigation which could have been avoided if the records of the second claimant were properly kept, thus attracting an adverse cost order.

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## ORDER

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- a) The applicant is directed to release the properties listed in annexure “JPN1” of the translated annexure to the second claimant.
- b) The second claimant’s claim is dismissed in respect of the following properties:
  - i) 8 x Chairs
  - ii) 1 x Dishwasher

- iii) 1 x Coffee table
  - iv) 2 x Wood tables
  - v) 1 x Steel Table
  - vi) 1 x Tumble Dryer
  - vii) 1x Fridge
  - viii) 1x Deep Freezer
  - ix) 1 x Black leather lounge Suite
  - x) 2x Double beds
- c) The second claimant must pay the costs of the applicant and the first claimant.
- d) The matter is removed from the roll and regarded as finalized.

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## RULING

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### **Introduction**

[1] This is an interpleader brought to the fore in the execution of a judgment debt granted in favour of the first claimant.

[2] The applicant is the Deputy Sheriff for the district of Tsumeb. He holds no interest in this matter save for charges and costs which he incurred in executing the Warrant of Execution. He presented no arguments relevant for the adjudication of the dispute between the parties. The first claimant (execution creditor) is MOTOVAC NAMIBIA (PTY) LTD, a private company with limited liability duly registered in the Republic of Namibia with registration CY/2008/0163, with principal place of business at Erf 54, No.19 Edision Street, Southern Industrial Area, Windhoek, Republic of Namibia. The second claimant is the GROBLER FAMILY TRUST, a trust registered at the Master's Office seemingly on 27 May 2003.

[3] On 11 October 2019 the first claimant instituted legal proceedings out of the High Court of Namibia against SPARKLER INVESTMENTS CC AND STEPHANIE

GROBLER (herein collectively referred to as the defendants) under case number HC-MD-CIV-ACTCON-2019/04543 claiming an amount of N\$ N\$73 812.58 for breach of a credit agreement. The claim relates to goods purchased on credit for which SPARKLER INVESTMENTS CC did not settle while the STEPHANIE GROBLER (Ms. Grobler) bound herself to the debt as surety in favour of the first claimant.

[4] The matter was undefended and judgment was entered on 6 November 2019 against the defendants jointly and severally. A Warrant of Execution of movable properties was issued by the Registrar of the High Court of Namibia (Main Division) on the 7<sup>th</sup> November 2019 in favour of the first claimant pursuant to the afore-mentioned Judgment granted in favour of the first claimant.

[5] In a quest to execute the Warrant of Execution, on 31<sup>st</sup> July 2020 the applicant served the Warrant of Execution on Ms. Grobler at her place of residence situated at No 457, Grasvlakte, Lekkerkry Area, Tsumeb. The applicant proceeded to attach movable properties and filed a Notice of Attachment in execution in respect of the following movable properties attached:

- a) 1 x Black leather lounge suit;
- b) 1 x Coffee table;
- c) 1 x Dining room table with 8 x chairs;
- d) 1 x Wood Cupboard with doors;
- e) 1 x Wood Cupboard with drawers;
- f) 1 x Wood bar;
- g) 2 x Steel Cabinets;
- h) 1 x wood TV Cupboard;
- i) 1 x Hisense TV;
- j) 4 x Double beds;
- k) 4 x Wood clothes cupboards;
- l) 1 x Head board;
- m) 1 x Dressing room table with mirror;

- n) 2 x Deep freezers;
- o) 2 x Fridges;
- p) 1 x Gas stove;
- q) 3 x Kitchen cupboards;
- r) 1 x Washing machine;
- s) 1 x Tumble dryer;
- t) 1 x Steel table;
- u) 1 x Steel cupboard;
- v) 1 x Dish washer;
- w) 2 x Wood tables;
- x) 8 x Chairs.

[6] The second claimant claims ownership of the attached properties and seek an order to have the said properties released from attachment. Mr Mokhatu who appeared on behalf of the second claimant, submitted that the properties appearing on annexure “JPN1” were donated to the second claimant and should be released from attachment. He submitted with emphasis that the said donation occurred way before the judgment debt was granted in favour of the first claimant.

[8] Ms Grobler who is one of the trustees of and is the founding trustee of the second claimant deposed to an affidavit where she stated *inter alia* that a substantial quantity of assets attached by the applicant belong and were acquired by the second claimant. She further stated that the said ownership resulted from a donation made seven years before the default judgment was granted by this court in favour of the first claimant.

[9] The second claimant further attached the documentations indicating its formation and listed its acquired assets. Ms. Grobler stated that the list of assets for the second claimant was not updated properly. This she stated emanated from a situation where the second claimant in 2002 sent the list of donated assets to its administrator, being PriceWaterHouseCoopers, but which email address turned out to be a wrong address

resulting in the asset list not updated. Mr. Mokhatu wrapped up his arguments that the attached properties are *de jure* owned by the second claimant notwithstanding that they remained available for daily utilization by Ms. Grobler and therefore should be released from attachment.

[10] Ms. Shigwedha who appeared for the first claimant submitted that she takes no issue with the registration of the trust. However, she pointed out that the second claimant failed to provide sufficient proof that it owns all attached properties premised on the alleged donation. She further indicated that certain attached items are not listed in annexure "JPN1" as belonging to the second claimant. The second claimant therefore failed to establish ownership over the items which appear in the inventory of the Notice of Attachment in Execution but which features nowhere in annexure "JPN1", so the argument went. Ms. Shigwedha contended that the filing of affidavits for the second claimant should have produced sufficient particularity and placed proof of ownership of the properties by the second claimant beyond dispute. Ms. Shigwedha further listed the properties attached by the applicant but which do not appear on the list of properties owned by the second claimant and which should not be released from attachment as follows:

- (a) 8 x Chairs
- (b) 1 x Dishwasher
- (c) 1 x Coffee table
- (d) 2 x Wood tables
- (e) 1 x Steel Table
- (f) 1 x Tumble Dryer
- (g) 1x Fridge
- (h) 1x Deep Freezer
- (i) 1 x Black leather lounge Suite
- (j) 2x Double beds

## Discussion

[11] In *Gleaneagles Farm Dairy v Schoombee*,<sup>1</sup> the Appellate Division of South Africa stated that it is assumed that where one litigating party, in execution of a judgment in his favour, has goods attached which are with the other party, and a third party claims such goods to be his property, that third party bears the onus to prove his claim to the goods. The Court held a further view that this approach is based on two grounds: firstly, because the third party is the claimant and secondly, because of the presumption of ownership which flows from possession.

[12] In *casu*, the properties were attached from the place of residence of Ms Grobler against whom the judgment debt was granted. As a matter of logic, it is assumed that the movable properties found in her possession belongs to her and should be attached accordingly in furtherance of the Warrant of Execution. It follows from the above authority that the second claimant who claims ownership of the attached properties found at the place of residence of Ms. Grobler bears the onus of proof of such ownership on a balance of probabilities.

## Donation

[13] A donation may be defined as an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality whereby a person under no legal obligation undertakes to give something to another person called the “donee” with the intention of enriching the donee in return for which the donor receives no consideration nor expects any future advantage.<sup>2</sup>

[14] It is important to note that in a contract of donation the gift is made with the intention that it should forthwith become the property of the recipient and that it would not be returned to the donor under any circumstances. In my mind this presupposes that the person making the donation must have some title to the property which he

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<sup>1</sup> *Gleaneagles Farm Dairy v Schoombee* 1949 (1) SA 830 (AD).

<sup>2</sup> 1 Lawsa Vol 8 para 301.

intends to donate, which title affords him or her the right or power to dispose of the property.

[15] A party who relies on an agreement of donation must prove the existence of such donation.<sup>3</sup>

[16] Now, the court has no qualms over the registration of the trust and the matters ancillary thereto. Same was not placed in dispute by the first claimant. Browsing through the annexures filed of record, I could not find a deed of donation outlining the assets so donated to the trust. Can it be said that the affidavits filed in support of the second claimant's case established that there was a donation of properties to the second claimant in 2012 notwithstanding that such properties were not registered and listed as properties of the second claimant by then.

[17] In order for the second claimant to succeed with its claim it must prove that, notwithstanding the fact that Ms Grobler remained with the properties, delivery of such properties to the second claimant occurred constructively. Mr Mokhatu took the court on a journey of the following of different forms of constructive delivery:<sup>4</sup>

- a) *clavium traditio* – where the contents of a box or cupboard takes place by handing over the keys thereof;
- b) *traditio longa manu* – delivery by pointing out for example where the size, weight or nature of the object renders the physical removal difficult,
- c) *traditio brevi manu* – where a watchmaker purchases a watch handed to him for repairs;
- d) *constitutum possessorium* - The transferor retains physical control of the thing to be transferred, but he or she acknowledges that the transferee henceforth owns the thing and that he or she retains it on behalf of the latter.

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<sup>3</sup> See: *Thornycroft v Vas* 1957 (3) SA 754 (FC); *Jordan v De Villiers* 1991 (4) SA 396.

<sup>4</sup> LAWSA, Vol 27, 219, 220, 221, 222, 223, 224

[18] It was submitted by Mr Mokhatu that transfer of ownership of the properties in the present matter to the second defendant took the form of *constitutum possessorium*. Literally meaning that although the property remains in the physical control of the donor, the intention of the parties has changed in that the property henceforth belongs to the donee. Ms. Shigwedha had no complaint with this line of reasoning by Mr Mokhatu.

[19] I hold the view that indeed the aforesaid forms of delivery forms part of our law. Transfer by *constitutum possessorium* entails that even if the physical property *de facto* remains with the donor, the acknowledgment and intention that the donee owns the property henceforth amounts to constructive delivery of such property to the donee. Ms Grobler explained the mishap regarding sending the list of donated items as aforesaid which explanation I find acceptable. I am similarly satisfied that the assets so listed as acquired by the second claimant were donated to the second claimant. I find that such assets listed as belonging to the second claimant should be released from attachment by the applicant.

[20] Ms Shigwedha was emphatic in her submission that the attached items which are not proven to be on the list of the assets of the second claimant should not be released from attachment. Mr Mokhatu had no meaningful response to such submission.

[21] As a matter of law, where the second claimant cannot prove ownership of the attached properties then its claim must fall in respect of such properties. Based on the documents filed of record and submissions made by counsel, I find that properties not listed on the inventory of the second claimant cannot be released from attachment. The second claimant's application in that regard falls to be dismissed.

[22] Regarding costs, it remains the discretion of the court to award costs where appropriate. I find no malice on the part of the second claimant in terms of the claim brought, however, it is expected that parties must ensure that the affairs of trusts are maintained and handled with great due diligence. In this matter, the possibility that the parties would not have been prompted to litigate this matter had the records of the

second claimant being properly kept and readily available is high. In total condemnation of the mentioned actions of the second claimant I hold the view that second claimant should be visited with a cost order.

[23] In the foregoing, I make the following order:

- a) The applicant is directed to release the properties listed in annexure “JPN1” of the translated annexure to the second claimant.
- b) The second claimant’s claim is dismissed in respect of the following properties:
  - i) 8 x Chairs
  - ii) 1 x Dishwasher
  - iii) 1 x Coffee table
  - iv) 2 x Wood tables
  - v) 1 x Steel Table
  - vi) 1 x Tumble Dryer
  - vii) 1x Fridge
  - viii) 1x Deep Freezer
  - ix) 1 x Black leather lounge Suite
  - x) 2x Double beds
- c) The second claimant must pay the costs of the applicant and the first claimant.
- a) The matter is removed from the roll and regarded as finalized.

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O SIBEYA  
Judge

APPEARANCES:

FIRST CLAIMANT:

ENT SHIGWEHDA  
Dr Weder, Kauta & Hoveka Inc

SECOND CLAIMANT:

L MOKHATU  
Du Pisani Legal Practitioners