REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2020/00447

In the matter between:

ELIAS MICHAEL NARUSEB **APPLICANT**

and

LETSHEGO FINANCIAL SERVICES NAMIBIA (PTY) LTD **1ST RESPONDENT**

REVENUE SOLUTIONS NAMIBIA (PTY) LTD **2ND RESPONDENT**

BANK WINDHOEK LTD **3RD RESPONDENT**

Neutral Citation: *Naruseb v Letshego Financial Services* (HC-MD-CIV-MOT-GEN-2020/00447) [2021] NAHCMD 547 (23 November 2021).

Coram: MASUKU J
Heard: **18 May 2021**
Delivered: **23 November 2021**

Flynote: Civil Procedure – application for *mandament van spolie* – requirements application has to meet discussed – relief sought in notice of motion must be made out in accompanying affidavit- doctrine of *commixtio* discussed – contractual agreement entered into between the parties allowed for the action to be taken thus unlawful dispossession cannot be said to have taken place.

Summary: The parties to this application enjoy a banking-client relationship. The applicant took out a loan from the 1st respondent. He later was out of a job and fell into arrears with his monthly payments towards servicing the loan. The applicant had however held money in the amount of N$ 100 000 with the 3rd respondent in his account. As per the agreement between the parties the 1st respondent, through the 2nd respondent, its debt collector, withdrew these funds which went to the settlement of the principal debt held by the 1st respondent. The applicant, dissatisfied with this, lodged an application for spoliation on an urgent basis to restore these funds. The court after hearing the arguments from both parties then found as follows:

Held: that for a matter to be heard on an urgent basis, the underlying prayer should be one for the matter to be heard as one of urgency, condoning the non-compliance with the rules of this court and dispensing with the forms of service.

Held that: with reference to the doctrine of *commixtio* it should not be lost that the beneficiary of the deposit remains that of the client.

Held further that: The dispossession claimed by the applicant was done by virtue of a contractual agreement. The dispossession claimed by the applicant was thus carried out through the correct procedure.

Held: that there is a disparity in the applicant's notice of motion and the accompanying affidavit and as such, the relief sought, i.e. *mandament van spolie*, has no factual or legal basis established in the founding affifavit.

The application was accordingly dismissed with costs.

ORDER

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1. The application for the First and Second Respondents to be ordered to deposit or transfer the sum of N$ 100 000 into the account of the Applicant held with the Third Respondent be and is hereby dismissed.
2. The application to have the Third Respondent not to allow the Second Respondents to transfer or withdraw any amount of money from the

Applicant's account held at the bank of the Third Respondent without due process of law is hereby refused.

3. The applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

Introduction

[1] By way of an urgent application, the applicant, Elias Michael Naruseb approached this court, seeking the following relief against respondents:

'1. Within 2 (two) days from the date of this judgment, the First and the Second Respondents are hereby ordered to deposit or transfer the sum of N$ 100,000.00 into the acount (*sic*) of the Applicant with account number 1203602301 held at the bank of the Third Respondent, Kudu Branch, Independence Avenue, Windhoek.

2. The Third Respondent is hereby ordered not to allow the First and the Second Respondents to transfer or withdraw any amount of money from the Applicant acount (*sic*) with account number 1203602301 held at the bank of the Third Respondent without a due process of law.

3. The First, the Second and the Third Respondents are hereby ordered to pay the cost of this application jointly and severally, one paying the other to be absolved.'

[2] In essence the applicant seeks an order for the respondents to restore a sum of N$ 100 000 which was removed from his bank account by the respondents. The removal of the aforementioned amount is not a subject of disputation. This court is however tasked to decide whether such removal was lawful.

[3] The parties are at odds recording the issues giving rise to the dispute which generates much controversy. Briefly stated, the facts giving rise to the dispute can be summarised as recorded below.

The Parties

[4] The applicant is Elias Michael Naruseb, an unemployed adult male who resides at Havanah Court, Windhoek.

[5] The First Respondent is Letshego Financial Services Namibia (Pty) Ltd, a company incorporated as such in terms of the applicable Namibian company laws, with its place of business at 18 Schwennsburg Street, Windhoek.

[6] The Second Respondent is Revenue Solutions Namibia (pty) Ltd, a company incorporated as such in terms of the applicable Namibian company laws, with its place of business at cnr of Trift and Church Street, Windhoek.

[7] The Third Respondent is Bank Windhoek Limited a bank incorporated as such in terms of the applicable Namibian company and banking laws, with its principal place of busine at Kudu Branch, 262 Independnece Avenue, Windhoek.

The Applicants case

[8] It is the applicant's case that on 15 January 2020 he took out a loan in the amount of N$60 564.84 from the 1st respondent. In terms of the agreement the applicant alleged that this loan was insured and in the event he was out of employment, the insurers would settle the loaned amount. On 15 January 2020 the 1st respondent made wrongful and unlawful debit entries on the loan statement in the amounts of N$1217.27 and N$113 647.89.The applicant alleged that these amounts escalated the loan amount from N$60 564.84 to N$170 000 and because of this error the applicant was burdened with a loan amount in excess of N$290 000.

[9] In March 2020 the applicant lost his job where he was employed at the Ministry of Health and Social Services. At this point, he was under the impression that the loan would be paid off because it was insured. He duly notified the 1st and 2nd respondents of his employment status. This eventually led to the arrears on the loan account as he had no salary to service the loan any longer.

[10] It is the applicants further case that on 21 October 2020, he was in peaceful and undisturbed possession of the movable property to wit N$100 000, which was in his bank account held with the 3rd respondent. On even date and without recourse to due process of the law, the applicant contends that the 1st respondent in collusion with the 3rd respondent despoiled the applicant of his possession of the aforementioned amount. This was done by transferring these funds by way of an EFT from the applicant's account.

[11] The applicant contends that the self-help that the respondents resorted to was wrongful and unlawful. This is so because they ought to have rather instituted action against the applicant for payment of the arrears, thereby giving him an opportunity to defend his action as there is disputation regarding the amount payable by him and that the insurance ought to have covered the loan as a result of his discharge from his employment.

[12] The applicant contends that as a result of the actions of the applicant he suffered an apprehension of irreparable harm and this is because his standard of living was lowered and he is not able to pay for and buy food and his basic needs. The amount taken by the respondents was his only source of livelihood.

[13] On the aspect of urgency, the applicant contends that spoliation proceedings are by their very nature urgent. Further he submits that because of the respondents' actions he is unable to maintain his normal standards of living.

The Respondents' case

[14] The respondents hold a wholly different view in respect of this matter. Firstly, they took issue with the application as brought by way of urgency. They contend that any perceived urgency was self created. This is so because the funds were withdrawn on 21 October 2020 and this application was only lodged three weeks after this occurrence. Furthermore, the respondents contend that the applicant has failed to set out the circumstances that render the matter urgent. Because of this, they further contend he has paid mere lip service to the rules relating to urgency.

[15] In addition to this the respondents have raised a point *in limine*. This point relates to the competency of the relief sought. They contend that the applicant in his founding papers seeks the restoration of the possession of the funds withdrawn from his account. However, the relief sought in the notice of motion does not seek this, relief but what is instead sought is for his bank account to be credited with N$ 100 000, which is coupled with a final interdict against the 3rd respondent. This they contend is not compatible with an application for *mandament van spolie.* They contend further that no case has been made out for the relief sought, in particular the final interdict sought.

[16] The court on the day of hearing heard the merits of the matter. It is for this reason that it is prudent to set out the respondents position on the merits of the matter even though ordinarily if the court upholds the points *in limine* it brings the matter to an end. What follows is the repondents position.

The pertinent facts

[17] On 12 February 2019 the applicant concluded loan agreement with the 1st respondent in terms whereof the 1st respondent lent and advanced to the applicant an amount of N$122 400. During January 2020, the applicant again approached the 1st respondent and applied for a second loan. The agreement between the parties was to extinguish the first loan and consolidate the sums for the applicant to only have one active loan. The second loan in the amount of N$177 000 was then approved. The second agreement was concluded on 13 January 2020.

[18] What appears to be of importance to the instant proceedings is paragraphs 20.1 to 20.6 of the agreement entered into. In so far as it relates to the authorisation given by the applicant to the 1st respondents and its holding companies to draw the amounts necessary on the applicants account for the commitments in terms of the loan repayment. Such monies so withdrawn being deemed to have been withdrawn by the applicant himself. These provision state as follows:

‘20.1 The applicant authorises Letshego, its holding company, or any other designated agent, to draw against his account where his account is or may be transferred to the amount necessary for payment of the monthly, quarterly/annual commitment due in

respect of the loan repayment or any future indebtness that the applicant may icur with Letshego.

20.2 All such withdrawals from the applicant's bank account shall be treated as though they had they had been authorised/signed by the applicant himself.

20.3 The applicant authorised Letshego to make any arrangement and to sign all documents which Letshego may deem necessary to procure payment of the instalments of the loan through any financial or deposit taking institution with whom the applicant holds any account. The steps contemplated herein before may include withdrawals made through any electronic method or procedure.

20.4 In addition to 20.3 above, the applicant irrevocably authorised Letshego to draw against the applicant's bank account (at any bank or from any bank account to which the applicant may transfer his account), the sum reflected as the instalment payment due by the applicant to Letshego together with any arrears and accrued interest.

20.5 The applicant confirms that the debit order authority he grants to Letshego is irrevocable during the term of the loan and shall be a contuing authority in favour of Letshego until any and all liabilities owed by the applicant to Letshego is repaid in full.

20.6 If any amount is not paid by the applicant on the due date, then the full amount of capital, interest and all other amounts then outstanding shall become immediately due and payable by the applicant to Letshego.'

Determination

[19] The starting point of the matter is to address the issue of urgency. If one is to take a close look at the prayers sought in the notice of motion the applicant failed to pray for the matter to be heard as one of urgency, to condone his non- compliance with the rules of this court and for the court to dispense with the forms and service as provided for by the court. A matter can never be heard on an urgent basis if this underlying prayer does not form part of the notice of motion. The notice of motion is the foundation of an applicants case. One cannot substantiate relief sought in the accompanying affidavit if it is not contained in the notice of motion. The applicants fail on this score alone.

[20] The applicants in their heads of argument indicated that since inception the matter had been docket allocated and resultant thereof the matter has not been dealt with as an urgent matter. This is not denied by the respondents. I find that the point *in limine* relating to urgency raised by the respondents has been overtaken by events and this matter was so to say heard in the normal course, considering that this matter was allocated six months for the delivery of judgment whereas had it been an urgent application it ought to have been fifeteen days. I will not take this point of urgency any further.

[21] It is however noteworthy that regardless of whether an application is by its inherent nature urgent, a party is not exempted from placing material circumstances before the court thereby deposing to the factors that render the matter urgent.

[22] In order for a party to be successful in spoliation proceedings there are two factors that must be satisfied. These were laid doen by the Supreme Court in *New Era Investment (Pty) Ltd v Ferusa Capital Financing Partners CC*.[1] The Supreme Court expressed itself in the following language at para [37]:

> 'In spoliation proceedings, an applicant must allege and prove peaceful and undisturbed possession of the property in question and an unlawful deprivation of that possession by the respondents. These are two elements which the appellant was required to establish in these proceedings on a balance of probabilities.
> [38] As far as the first element of possession is concerned, it would suffice if the appellant exercised physical control (*detentio*) over the building sites of a sufficiently stable and durable nature to constitute peaceful and undisturbed possession with the intention of securing some benefit for itself. Both elements must be present.'

[23] In the present matter the claim relates to an alleged personal right relating to a credit balance on the bank account of the applicant. The respondents allegedly dispossessed money from the applicant by way of electronic funds transfer. This arouse by virtue of the applicants failure to settle a debt.

[24] The legal nature of money is such that the bank owns the money once it has been deposited. This was correctly placed by the respondents in their heads of argument as follows:

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[1] *Era Investment (Pty) Ltd v Ferusa Capital Financing Partners CC* 2018 JDR1202 (NmS).

'Generally, where money is deposited into a bank account of an account-holder it mixes with other money and, by virtue of *commixtio*, becomes the property of the bank regardless of the circumstances in which the deposit was made or by whom it was made..'[2]

[25] The respondents carried on as follows:

'The account-holder has no real right of ownership of the money standing to his credit but acquires a personal right to payment of the amount from the bank, arising from their bank-customer relationship. This is also so where, as in this case, no money in its physical form is in issue, and the payment by one bank to another, on a client's instruction, is no more than an entry in the receiving bank's account.'

[26] I pause to state that it should not be lost that the beneficiary of the deposit remains that of the client. This is so because the client can demand that the electronic value be redeemed in cash or used for payments and be used for making transfers etc. The instruction comes from the client, and it is this client that excercises a demonstratable right over the money. Suffice to say that when a client is unable to exercise any of the aforesaid actions they no longer have a right to the money. For this to be equated to dispossession is another leg of determination altogether.

[27] In this instance the dispossession claimed by the applicant was done by virtue of a contractual agreement. This is so because the applicant, when entering into the loan agreement, authorised the 1st respondent and its holding companies to draw the amounts necessary on the applicants account for the commitments in terms of the loan repayment.

[28] This in turn meant that when the loan account was in arrears as is the case now, the bank was allowed to transfer credit from the applicant's account with funds and into the account in arrears, thereby distinguishing the debt. This was done by the book and was in all instances lawful. Disposession cannot have said to have occurred when there is an underlying contract enabling such transfer to be carried out. The transfer, it would seem followed the correct procedure.

[29] It goes without saying that there appears to be a disparity in the applicant's notice of motion and the case made out in the accompanying affidavit. This is so because the applicant seeks for the deposit or transfer of the sum of N$ 100 000 into

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[2] *Trustees, Estate Whitehead v Dumas and Another* 2013 (3) SA 331 (SCA) at paragraph 13.

the applicants specified bank account, whereas in the affidavit he claims for the money to be restored as it has been allegedly spoliated. Thus I am inclined to agree with the respondents that the relief sought is incompetent in so far as it relates to this aspect. The relief sought is not sustainable with the application for *a mandament van spolie*.

[30] The applicant has failed to make out a case for the final interdictory relief sought against the respondents. It is not sufficient to only pray for the relief, but one ought to meet the requirements on the papers and establish the material facts which will enable the court to properly consider what is placed before it and make the determination. The applicant has throughout his application failed dismally in this regard.

Conclusion

[31] In view of the analysis above, together with the courts findings and conclusions, I am of the considered view that this application is must fail.

Costs

[32] There is nothing apparent or submitted on record or otherwise that would justify the court to deviate from the ordinary rule that costs should follow the event. The costs shall follow the respondent's success in this matter.

Order

[33] The order that that I make is the following:

1. The application for the First and Second Respondents to be ordered to deposit or transfer the sum of N$ 100 000 into the account of the Applicant held with the Third Respondent be and is hereby dismissed.
2. The application to have the Third Respondent not to allow the Second Respondents to transfer or withdraw any amount of money from the Applicant's account held at the bank of the Third Respondent without due process of law is hereby refused.

3. The applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner.
4. The matter is removed from the roll and is regarded as finalised.

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T. S. Masuku

Judge

APPEARANCES:

APPLICANT:	Mukonda & Co Incorporated
	R. Mukonda
RESPONDENT:	C. Van Der Westhuizen
	Instructed by Dr Wender Hoveka & Kauta