

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case Title: Rauna Mofuka and Afri-J Trading CC	Case No: HC-MD-CIV-MOT-GEN-2023/00263
Applicant	Division of Court: Main Division
Respondent	Heard on: 23 June 2023
Heard before: Honourable Lady Justice Rakow	Reasons delivered on: 6 July 2023
Neutral citation: <i>Mofuka v Afri-J Trading CC</i> (HC-MD-CIV-MOT-GEN-2023/00263) [2023] NAHCMD 380 (6 July 2023)	
Order: <ol style="list-style-type: none">1. Condonation is granted for the applicant's non-compliance with the rules of this court.2. The erroneous warrant of execution is hereby cancelled.3. The respondent should return and hand over the applicant's vehicle (WVWZZZ60529 and Engine number CLP184286) within 24 hours of this order.4. Cost the application is awarded to the Applicant.5. The matter is removed from the roll: Case Finalized.	
Reasons for order:	
RAKOW J : <u>Introduction</u>	

[1] The purpose of this application is to seek an order from the Honourable Court for an order of *mandament van spolie* to order the respondent to return possession of the movable property to wit, a VW 251 Polo Sedan with Vehicle Identification Number WVVZZZ60ZFT060529 and Engine Number CLP184286.

[2] The applicant seeks an order in the following terms:

‘1 Condoning the applicant's non-compliance with the rules of this court, pertaining to time periods and services of the application, as well as giving notice to parties as contemplated in terms of rule 73 of this court and directing that the application be heard on a urgent basis.

2 An order directing the respondent to immediately return and hand over applicants vehicle (WVVZZZ60529 and Engine number CLP184286) within 24 hours of this order.

3 Cost of suit

4 Further and/or alternative relief.’

[3] The respondent opposes the application.

Background

[4] The vehicle of the applicant was forcibly taken from her on 6 June 2023 at about 15H00 by two unknown male persons dressed in plain clothes acting on the instructions of the respondent.

[5] No court order or writ of execution was presented and no notice of attachment was presented to the applicant. The seizure of the applicant's vehicle was not carried out by the deputy sheriff as the authorised person to do so in accordance with the rules of court.

Arguments in favour of the applicant

[6] It is argued that it is obvious that the writ of execution (annexure C to the founding affidavit) was issued on 11 February 2021, long before the applicant was held and deemed personally liable for the debts of Desire Trading Investment CC as per the court order, annexure F of the founding affidavit dated March 2023. The applicant further argues that it successfully opposed the attachment of her personal property pursuant to the aforesaid writ of execution through launching interpleader proceedings with the deputy sheriff and her personal belongings were released from attachment by the deputy sheriff. Reference to annexure G of the founding

affidavit.

[7] It is submitted that only the deputy sheriff (in this instance for the district of Windhoek) or any other person duly appointed as a temporary deputy sheriff in terms s 34 of the High Court Act has the legal authority to serve writs of execution and to attach the property of a judgement debtor pursuant to any writ of execution.

Arguments in favour of the respondent

[8] The respondent argues that the applicant failed to make out a case on why she will not be afforded substantial redress at a hearing in due course. The applicant refused and/or chose not to address this requirement in her founding affidavit and even in her replying affidavit.

[9] The applicant alleges that the writ of execution is non-existent. The position is not correct as the writ legally and lawfully issued by the Registrar of this court is attached to the respondent's answering affidavit. The applicant failed to rescind/set aside the writ of execution and more importantly the applicant failed to deal with it in her founding affidavit. The applicant should make her case in the founding affidavit and not in the replying affidavit. The writ was presented to the applicant before she brought her application.

Analysis

[10] Spoliation application is by nature based on the monument of (indistinct) urgent application. By the nature of the application, it is an urgent application. So, I am going to treat this matter as an urgent application and I am going to find that the applicant indeed showed that she was in possession of the vehicle before it was removed from her. I further find that the manner in which it was removed from her illegally and not based on a writ of execution, there was no writ of execution present at the time and the people who effected the removal were not entitled to do so.

[11] Although they later on, as pointed out by Mr Enkali 14 days later, actually attached the vehicle through the deputy sheriff. I further find that the warrant of execution that was presented to court, is not for the matter in which the judgment was granted but for a different matter and was erroneously issued in 2021 by the registrar as there was no judgment at that stage against the applicant in this matter.

[12] In the result, I make the following order:

1. Condonation is granted for the applicant's non-compliance with the rules of this court.
2. The erroneous warrant of execution is hereby cancelled.
3. The respondent should return and hand over the applicant's vehicle (WVWZZZ60529 and Engine number CLP184286) within 24 hours of this order.
4. Cost the application is awarded to the Applicant.
5. The matter is removed from the roll: Case Finalised.

Judge's signature	Note to the parties:
RAKOW J Judge	Not applicable
Counsel:	
Applicant:	Respondent:
N Enkali Of Kadhila Amoomo Legal Practitioners, Windhoek	S Kahengombe Of Kahengombe Law Chambers Windhoek