

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2019/00552

In the matter between:

THE ACTING DEPUTY SHERIFF OF WINDHOEK

MANFRED JUAN HENNES

APPLICANT

and

ALBERTUS NICOLAAS SMITH T/A BERTIE

SMITH CONTRACTOR SERVICES

CLAIMANT

FIRST

MARIANNE CHRISTINE PETHERBRIDGE

NOMINEE OFFICIO APPOINTED AS

EXECUTRIX OF ESTATE LATE PETER IAN

PETHERBRIDGE

SECOND CLAIMANT

BERNALEE EIMAN

THIRD CLAIMANT

Neutral citation: *The Acting Deputy Sheriff of Windhoek Manfred Juan Hennes v Albertus Nicolaas Smith t/a Bertie Smith Contractor Services* (HC-MD-CIV-ACT-CON-2019/00552) [2024] NAHCMD 77 (4 March 2024)

Coram: SCHIMMING-CHASE J
Heard: **Determined on the papers**
Delivered: **4 March 2024**

Flynote: Practice — Execution — Interpleader — Onus of proof — Sufficiency of evidence — The onus of proof in an interpleader suit is on the claimant.

Practice — Interpleader — Claimant not required to set out claim with the precision required in pleadings, but claimant must furnish sufficient particulars of the claim to enable the court to make a determination.

Marriage — Proprietary rights — The death of a spouse terminates a marriage in community of property and, thus, terminates the consequences of marriage.

Summary: In this interpleader proceeding the first claimant sued the second claimant in her personal capacity, based inter alia on negligent performance of her duties as set out in a legal services agreement concluded between the two of them. Judgment was granted in favour of the first claimant on 8 March 2022, after which two writs of execution on the second claimant's movable property were issued out of this court by the registrar on 24 March 2022. The Deputy Sheriff of Windhoek then attached various movable properties at the second claimant's office during October 2022.

The second claimant's interpleader claim to the attached movable property is launched in her capacity as executor of the estate of her late husband Mr Ian Petherbridge (who passed away on 30 November 2019) to whom the second claimant was married in community of property. The second claimant alleged that her late husband's estate has not been finally wound up in terms of the Administration of Estates Act 69 of 1968, and given that she was married to her late husband in community of property, the movable properties attached by the Deputy Sheriff of Windhoek forms part of the late estate and, therefore, cannot be sold in execution.

The first claimant alleged that the second claimant failed to attach any documentation proving that the estate of the second claimant's late husband owns the property so attached.

Held that, interpleader proceedings, as provided for in rule 113 of the Rules of the High Court, contain the means to adjudicate rival claims to property that is attached by the deputy sheriff in the course of executing a judgment. Claimants are required to set out the particulars for their claim to the goods by providing the material facts which form the basis for their claim and set out a valid cause of action.

Held further that, the onus is on the second claimant to set out such facts and allegations which would constitute proof of ownership of the movable properties attached.

Held further that, the death of a spouse terminates a marriage in community of property and, thus, terminates the consequences of marriage. The second claimant's husband passed away on 19 November 2019. Judgment was granted against the second claimant in her personal capacity on 8 March 2022.

Held further that, the second claimant has failed to sufficiently demonstrate that ownership of the movable property attached at her offices belong to the estate of her late husband. In any event, the terms of the will of the second claimant's husband, as disclosed by the Master, reveal that the second claimant is the sole heir in his estate.

The interpleader proceeding is therefore dismissed.

ORDER

1. The second claimant's interpleader application is dismissed.

2. All items listed on the applicant's inventory list remain under attachment.
3. The applicant is granted leave to sell the movable property attached on 25 October 2022 under case number HC-MD-CIV-ACT-CON-2019/00052.
4. The second claimant is ordered to pay the costs of the application.
5. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

Introduction and parties

[1] The court is called upon in these interpleader proceedings to determine a claim to movable property attached by the applicant, the acting deputy sheriff,¹ at the offices of Marianne Petherbridge practising under the name and style of Petherbridge Law Chambers, on 25 October 2022. I refer to the applicant as 'the deputy sheriff' for purposes of this judgment.

[2] The first claimant is Albertus Nicolaas Smith t/a Bertie Smith Contractor Services, a major male businessman and contractor. I refer to him as 'Mr Smith'.

¹ Manfred Juan Hennes, an adult male duly appointed under s 30 of the High Court Act 16 of 1990.

[3] The second claimant is Marianne Christine Petherbridge, a duly admitted legal practitioner of this court practising under the name and style of Petherbridge Law Chambers. I refer to her as 'Mrs Petherbridge'.

[4] Mrs Petherbridge is the judgment debtor in an action instituted against her by Mr Smith, which I deal with below in this judgment. She is, however, cited in these interpleader proceedings in her nominal capacity as executrix in the estate of the late Peter Ian Petherbridge, to whom she was married in community of property, and who passed away on 19 November 2019.

[5] In this aforesaid capacity, Mrs Petherbridge claims that the property attached, barring six items, belong to the joint estate, which has to date not been finalised. In this regard, letters of executorship were issued to Mrs Petherbridge on 5 June 2020.

Background facts

[6] The factual background to this interpleader proceeding is somewhat checkered.

[7] On 13 February 2019, the Mr Smith issued summons against Mrs Petherbridge for payment of the amount of N\$100 000, premised on alleged negligent performance of her duties as a legal practitioner, contrary to the provisions of a legal services agreement concluded between the two parties.

[8] On 23 February 2021, this court, *per* Ueitele J, struck Mrs Petherbridge's defence to Mr Smith's claim in terms of rule 54(1), subsequent to a sanctions hearing. Mr Smith was then provided the opportunity to apply for default judgment.

[9] On 28 February 2022, after protracted interlocutory battles, including but not limited to an application for relief from sanctions imposed in terms of rule 54, and an application for a rescission of the order dated 23 February 2021 by Mrs Petherbridge, this court, *per* Ueitele J, dismissed Mrs

Petherbridge's application for rescission of the order. A reasoned judgment was delivered by Ueitele J on 28 January 2022.²

[10] On 8 March 2022, judgment was granted in favour of Mr Smith against Mrs Petherbridge for payment of N\$100 000 plus interest at the rate of 20 per cent per annum *temporae morae* as of 8 March 2022 to date of final payment (both days inclusive) together with costs of suit.

[11] Thereafter, and on 24 March 2022, the registrar of court issued a writ of execution against Mrs Petherbridge's movable properties and the deputy sheriff laid under judicial attachment certain movable properties located at the offices of Mrs Petherbridge. On 6 April 2022, an *allocator* was issued in the amount of N\$72 735,52 relating to the costs order of 8 March 2022. A second writ of execution against Mrs Petherbridge's movable properties was then issued on 17 October 2022.

[12] The deputy sheriff arranged for a sale in execution of the movable properties for 23 November 2022. After Mrs Petherbridge's intervention, and on 22 February 2023, the deputy sheriff filed an interpleader notice in terms of rule 113(3). Mr Smith was cited as the first claimant, and Mrs Petherbridge in her nominal capacity was cited as the second claimant. The third claimant's claim to an apple laptop that was attached by the deputy sheriff was upheld (without opposition from any of the claimants) on 19 May 2023, and this court ordered the release of the laptop to the third claimant. Resultantly, the claim by the third claimant is a non-issue.

[13] According to the Deputy Sheriff's notice under rule 113(3), the following movable properties were attached by him at the offices of Petherbridge Law Chambers, namely:

- (a) 3 X Proline computers;

² *Albertus Nicolaas Smith T/A Bertie Smith Contractor Services v Marianne Petherbridge, Practicing under the name and style of Petherbridge law chambers* HC-MD-CIV-ACT-CON-2019/00552 [2022] NAHCMD 21 (28 January 2022).

- (b) 1 X Canon printer;
- (c) 4 X wooden cupboards;
- (d) 2 X filing cabinets;
- (e) 2 X wooden computer tables;
- (f) 5 X office chairs;
- (g) 2 X box freezers;
- (h) 1 X Samsung fridge;
- (i) 1 X Toyota Bakkie with registration number N1305W ('the Toyota bakkie');
- (j) 1 X meat saw;
- (k) 1 X vacuum cleaner;
- (l) 1 X Honda generator;
- (m) Various tools.

[14] In an affidavit in terms of rule 113, deposed to by Mrs Petherbridge, she stated that she deposed to the affidavit in her personal capacity as well as for and on behalf of the estate of her late husband. She further stated that she has an interest in the property attached because she was married in community of property to her late husband, who passed on 19 November 2019. Letters of executorship dated 5 June 2020 were attached. She stated that items (a) to (f) are used to practise her profession, but that the remainder of the items (items (g)-(m)) are assets in her late husband's estate as they were married in community of property.

[15] As regards the Toyota bakkie,³ and according to Mrs Petherbridge, this vehicle belonged to her late husband. She averred that the estate had not been finalised and that as at October 2022 (almost three years since her husband's passing) no liquidation and distribution account had been finalised. Mrs Petherbridge had in the interim applied for and was granted an extension by the Master. She submitted that Mr Smith would have to institute a claim against the estate, alternatively await finalisation of the estate, as the rights of other creditors may not be prejudiced. These allegations were repeated in her

³ See 'item (i)'.

particulars of claim in terms of rule 113, delivered on 11 April 2023. At the end, Mrs Petherbridge prayed for an order that the attachment be set aside with costs.

[16] In his opposition, Mr Smith contended that no proof had been submitted regarding the request for extension to file a liquidation and distribution account to the Master as alleged by Mrs Petherbridge. As regards the Toyota bakkie, Mr Smith disputed ownership thereof by the estate or by the late Mr Petherbridge on the premise that no registration certificate had been provided to indicate that the vehicle was registered in his name.

[17] In support of her claim, Mrs Petherbridge provided some of the documentation which she previously presented to the Master's office, much of which was dedicated to requests for postponement for submission of the liquidation and distribution account. In addition, a license disc for the Toyota bakkie was provided, in the name of P I Petherbridge, but significantly the expiry dates of the two license disks are 31 May 2023 and 31 May 2024. Mrs Petherbridge also attached a copy of her insurance schedule as proof that the Toyota bakkie belonged to the late Mr Petherbridge. An affidavit deposed to by Robin Peter Petherbridge, the son of Mr and Mrs Petherbridge, stated that the remainder of the items on the inventory belonged to Mr Petherbridge, including the Toyota Bakkie.

[18] I pause to mention that *ex facie* the insurance schedule attached by Mrs Petherbridge, the policy commencement date is recorded as 9 December 2019, the annual renewal date was January 2024, and Mrs Petherbridge is indicated to be the registered owner of the exact same Toyota bakkie.

[19] The Deputy Master filed a report on 8 November 2023 after same was requested by the court, and reported that Ms Petherbridge applied for letters of executorship in her late husband's estate on 6 May 2020. The original joint last will and testament of Mrs Petherbridge's late husband dated 21 June 1980 was accepted by the Deputy Master on 28 May 2020. The joint will was

attached to the Master's report. It is important to note that Mrs Petherbridge, as survivor of the two, is the sole heir in her late husband's estate.

[20] It is reported that as far back as 15 February 2021, Mrs Petherbridge was directed to lodge the liquidation and distribution account, which she failed to do. It also appears from the report that the Master's office has consistently demanded from Ms Petherbridge to lodge the final liquidation and distribution account. An extension was yet again requested by Mrs Petherbridge which was rejected on 25 June 2023.

Legal principles and discussion

[21] The Supreme Court as recently as November 2023,⁴ reaffirmed the principles relating to interpleader proceedings in terms of rule 113. In essence, this genus of proceeding contains the means to adjudicate rival claims to a property which is attached in the course of executing a judgment.

[22] The claimant draws the onus and is required to set out in the particulars of his/her claim the material facts which form the basis of the claim.⁵ Where a third party claims that his/her goods have been attached in a proceeding involving other parties, the third party has the onus to prove his/her claim to the goods. The rationale is that the third party is the claimant and presumption of ownership flows from possession.⁶

[23] As regards ownership of the Toyota bakkie, it is well established that registration of a motor vehicle in a person's name is not sufficient to establish ownership. Ownership is based on the factual circumstances pointing/giving rise to ownership.⁷

⁴ *Marigold Hotel Developer (Pty) Ltd v Acting Deputy Sheriff Windhoek and another* (SA 51-2021) NASC [2023] (3 November 2023) paras 23-25 and the authorities collected there.

⁵ *Tsumeb v Koch & another* 2011 (1) NR 202 (HC); *The Acting Deputy Sheriff of Windhoek v Minnesota Trading Enterprises Group CC and Others* (HC-MD-CIV-ACT-CON-2020/01229 / INT-HC-INTERP-2020/00224) [2021] NAHCMD 7 (25 January 2021) para 11.

⁶ *Gleneagles Farm Diary v Western Bank Ltd v Fourie* 1979 (1) SA 157 (C) at 159-160.

⁷ *Uvanga v Steenkamp* (I 1968-2014) [2015] NAHCMD 273 (13 November 2015) paras 24-31

[24] Another important legal principle that is of relevance in this matter, as it relates to the joint estate, is that the death of a spouse terminates a marriage in community of property and, thus, terminates the consequences of marriage.⁸

[25] During the subsistence of the marriage, the spouses own the joint estate in equal, undivided 'tied-up' shares. On dissolution of the community, the shares become determinate and divisible. The half-share of the deceased spouse devolves upon his or her heirs. The surviving spouse retains his or her half-share. After the debts, which are charges on the joint estate have been paid; the residue is divided equally between the surviving spouse and the heirs of the first dying spouse.⁹

[26] Bearing the above principles in mind, I note firstly that the judgment debt incurred in this matter was incurred by Mrs Petherbridge in her personal capacity, and after her husband died, during 2022. It is also not in dispute from the last will and testament that Mrs Petherbridge is the sole heir in the estate of her late husband. The dilatory conduct of Mrs Petherbridge in preparing a liquidation and distribution account as reported by the Master, is not to be ignored, given that as at the hearing of this matter, Mr Petherbridge had passed four years ago. This same dilatory conduct, in the context of the timeous delivery of pleadings in the matter, was remarked upon by Ueitele J¹⁰ in the judgment that gave rise to the eventual attachment of the movable property at Mrs Petherbridge's offices.

[27] More importantly, Mrs Petherbridge has also not provided the court with proper proof that the estate or her late husband owns the property and the authorities collected there.

⁸ *Heaton et al 'Marriage'* The Law of South Africa 2 ed (2006) para 85; *Maqubela and another v The Master and others* 2022 (6) SA 408 (GJ) para 27.

⁹ H R Hahlo, the South African Law of Husband and Wife, Third Edition, Juta & Co.

¹⁰ *Albertus Nicolaas Smith T/A Bertie Smith Contractor Services v Marianne Petherbridge, Practicing under the name and style of Petherbridge law chambers* HC-MD-CIV-ACT-CON-2019/00552 [2022] NAHCMD 21 (28 January 2022) paras 31-38.

attached. No receipts or invoices of any sort were attached in respect of items (g) – (n). As regards the Toyota Bakkie, no registration papers were provided, only the licenses were provided, which bore the name of the late Mr Petherbridge. However, these licenses were renewed in 2023 and 2024. More importantly, the insurance documentation attached by Mrs Petherbridge with a starting date of 9 December 2019¹¹ indicate that she is the registered owner of the vehicle. Clearly there rests some credibility issues between what was alleged and the documentation attached.

[28] In light of the foregoing reasons, I am of the considered view that Mrs Petherbridge, in her capacity as executor of her husband's estate has not discharged her onus to prove ownership by the estate of the disputed items.

Conclusion

[29] In the end and for the foregoing reasons, the following order is made:

1. The second claimant's interpleader application is hereby dismissed.
2. All items listed on the applicant's inventory list remain under attachment.
3. The applicant is granted leave to sell the movable property attached on 25 October 2022 under case number HC-MD-CIV-ACT-CON-2019/00052.
4. The second claimant is ordered to pay the costs of the application.
5. The matter is regarded as finalised and removed from the roll.

¹¹ This is subsequent to Mr Petherbridge's passing.

E M SCHIMMING-CHASE

Judge

APPEARANCES

FIRST CLAIMANT: L Lardelli van der Westhuizen
Of Louis Karsten Legal Practitioners,
Windhoek

SECOND CLAIMANT: M Petherbridge
In person, Windhoek