



REPORTABLE

CASE NO: SA 51/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MARIGOLD HOTEL DEVELOPER (PTY) LTD

Appellant

and

ACTING DEPUTY SHERIFF WINDHOEK

First Respondent

INGO HASSE

Second Respondent

Coram: SHIVUTE CJ, SMUTS JA and FRANK AJA

Heard: 18 October 2023

Delivered: 3 November 2023

Summary: The second respondent in this appeal (first claimant in the interpleader proceedings) as plaintiff instituted an action against a firm cited as Marigold Hotels (the defendant). In that action, the plaintiff claimed N\$1 102 792,83 against Marigold Hotels, in respect of the balance owing for the sale and installation of goods. The plaintiff's summons was accompanied by a notice in terms of rule 42(5), (6) and (7) of the High Court Rules, calling upon the defendant, thus cited as a firm called Marigold Hotels, for particulars such as the full name and residential address of the

proprietor or partners at the relevant date, as contemplated by rule 42(5). The notice also required that the defendant must, concurrently with its response, serve the notice and summons on the persons referred to in that response, as is contemplated by rule 42(7). In response to the rule 42(5) notice, company registration documents of Marigold Hotel Developer (Pty) Ltd were attached, the appellant in this appeal and the second claimant in the interpleader proceedings.

The defendant (the firm) entered an appearance to defend and the plaintiff applied for summary judgment which was granted on 30 October 2019. The plaintiff thereafter proceeded to execute his judgment and the deputy sheriff attached movable goods pursuant to a writ of execution. The attached goods were those sold and delivered to the firm, as referred to in the particulars of claim. The appellant claimed ownership of the attached goods. Following the claim of ownership, the deputy sheriff, as applicant, brought an interpleader application under rule 113 of the Rules of the High Court citing the plaintiff as first claimant and the appellant as second claimant.

The interpleader proceedings were heard on 23 April and 11 May 2021. Neither party applied to lead evidence and merely argued their cases on the papers filed of record. Judgment was delivered on 11 June 2023. The court found that the appellant as second claimant had not established its claim to the attached goods, pointing out that no sufficient or satisfactory evidence had been placed before court to prove its claim to the goods. The appeal is against that judgment.

Interpleader proceedings as provided for in rule 113 of the Rules of the High Court contains the means to adjudicate rival claims to a property which is attached 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 are the basis for their claim and set out a valid cause of action – this is made clear in *Deputy Sheriff of Tsumeb v Koch & another* 2011 (1) NR 202 (HC).

Held that, in the absence of any request for the leading of evidence, the court was entitled to determine the interpleader proceedings based upon the particulars of claim and papers filed.

Held that, by electing not to lead evidence when it was called to put forward facts in its particulars of claim to the goods, the appellant cannot subsequently complain when it failed to set out any factual matter in its particulars of claim for its bald and unsupported assertion of ownership.

It is further held that, a more fundamental reason why the appeal and the appellant's invocation of the interpleader proceedings must fail is that the appellant had absolutely no basis to invoke interpleader proceedings and that its attempt to do so was contrived and completely without foundation.

Held that, the approach of the appellant in asserting in the interpleader proceedings that it was not a party to the proceedings is in direct conflict with what is provided for in rule 42(7) and the purpose of that rule as well as s 23 of the High Court Act 16 of 1990 which provides for the execution of process in respect of associations, partnerships or firms.

Held that, the appellant is thus the defendant for the purpose of the action and the execution of the ensuing summary judgment.

Held that, the invocation of interpleader proceedings by the defendant (the appellant), being without any basis at all, has only served to delay execution and frustrate the administration of justice. This constitutes an abuse and will not be countenanced and warrants a special order as to costs.

The appeal is dismissed.

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and FRANK AJA concurring):

[1] This appeal concerns interpleader proceedings and their abuse. Before referring to the nature of interpleader proceedings and their operation, it is apposite first to set out the litigation history for the context of the interpleader proceedings which then followed.

Litigation background

[2] The second respondent in this appeal (first claimant in the interpleader proceedings) as plaintiff instituted an action against a firm cited as Marigold Hotels. In that action, the plaintiff claimed N\$1 102 792,83 against Marigold Hotels, cited as a firm, in respect of the balance owing for the sale and installation of goods. Attached to the particulars of claim is a detailed proposal addressed to the Marigold Hotel Project and several delivery notes in respect of equipment addressed to Marigold Hotel and signed for without qualification. The plaintiff's summons was accompanied by a notice in terms of rule 42(5), (6) and (7) of the High Court Rules, calling upon the defendant, thus cited as a firm called Marigold Hotels, to provide particulars such as the full name and residential address of the proprietor or partners at the relevant date, as contemplated by rule 42(5). The notice also required that the defendant must, concurrently with its response, serve the notice and summons on the persons referred to in that response, as is contemplated by rule 42(7).

[3] In response to the rule 42(5) notice, the defendant's erstwhile legal practitioner attached company registration documents of Marigold Hotel Developer (Pty) Ltd, the appellant in this appeal and second claimant in the interpleader proceedings. The directors of the appellant were identified in the notice as Qiaoxia Wu and Songgen Huang and were provided with a notice (as contemplated in Form 15) by the defendant's erstwhile legal practitioner under rule 42(7).

[4] The defendant entered an appearance to defend and the plaintiff applied for summary judgment. The papers in the summary judgment proceedings have not been provided. Summary judgment was granted in the amount claimed. The defendant was represented in those summary judgment proceedings.

[5] It is also apparent from the record that the plaintiff thereafter proceeded to execute his judgment. The deputy sheriff attached movable goods pursuant to a writ of execution which included the goods sold and delivered, as referred to in the particulars of claim.

[6] Following the attachment, the appellant claimed ownership of the attached goods.

The interpleader proceedings

[7] Following the appellant's claim of ownership of those attached goods, the deputy sheriff, as applicant, brought the interpleader proceedings under rule 113 of

the Rules of the High Court, citing the plaintiff as first claimant and the appellant as second claimant.

[8] In response to the deputy sheriff's notice, the plaintiff as first claimant filed particulars of claim as contemplated by rule 113. A copy of the summons was attached and the averment was made that the defendant was represented by Ms Qiaoxia Wu when the sale agreement was entered into. The rule 42(5) notice was attached as well as the responses to it, including the reference to Ms Wu as a director of the appellant in one such notice and the rule 42(7) notice served upon her.

[9] Given the rule 42 responses, the plaintiff in those particulars contended that the appellant is to be 'regarded as a party to the (action) proceedings', with the rights and duties of a defendant in accordance with rule 42(9).

[10] It is further pointed out that the action was defended and on 30 October 2019, summary judgment was granted against the defendant.

[11] It is further stated that the plaintiff as first claimant caused to be attached the very same assets which he sold and delivered to the defendant at its stated address, as per the delivery notes and in respect of which the full purchase consideration

remained unpaid. (There had been part payment of the purchase price with the balance outstanding being claimed in the summons).

[12] The plaintiff sought the dismissal of the appellant's claim of ownership of the attached goods and that the appellant be barred from making any claim on the attached goods. Costs were also sought against the appellant.

[13] The appellant as second claimant also filed particulars of claim to the attached goods. Those particulars are brief and state that the action was against Marigold Hotels and that the consequent summary judgment was granted against Marigold Hotels. The writ also referred to Marigold Hotels. The appellant's then legal practitioners requested the deputy sheriff to institute interpleader proceedings as the appellant claimed to be the true owner of the goods and asserted that it 'was not a party to the proceedings', stating that the defendant was merely cited as Marigold Hotels whilst the appellant is a duly registered company called Marigold Hotel Developer (Pty) Ltd.

[14] The appellant further claimed that the attachment was erroneous as the goods belonged to it and that there existed no legal person known as Marigold Hotels. It sought the release of the goods to it and that the plaintiff pay its costs.

The approach of the High Court

[15] The interpleader proceedings were heard on 23 April and 11 May 2021 and judgment was promptly delivered by Parker AJ, on 11 June 2021. The High Court found that the appellant as second claimant had not established its claim to the attached goods, pointing out that no sufficient or satisfactory evidence had been placed before court to prove its claim to the goods.

[16] The court concluded that the appellant had thus not discharged the onus upon it to prove its ownership of the attached goods. The court ruled that the appellant and any person claiming under it were barred as against the deputy sheriff and the plaintiff from making claim on the attached goods. The appellant was also directed to pay the other parties' costs.

[17] The appellant appeals against that judgment.

The parties' submissions

[18] The appellant's approach is that its claim for ownership hinges on whether it is in law and in fact the judgment debtor in the action proceedings which resulted in summary judgment. The appellant contended that the court failed to appreciate that the appellant was not the judgment debtor in the action proceedings and that execution could not be levied against its property.

[19] The appellant also attacked the High Court's judgment for failing to call for evidence and argued that the court had failed to adjudicate upon the parties' respective claims to the goods. It was argued on behalf of the appellant that it was

sufficient for it to allege ownership and that it was then for the court to call for evidence on the issue before making a finding that the appellant had not established its ownership.

[20] It was argued on behalf of the plaintiff (second respondent) that no oral or other evidence was tendered on behalf of the appellant (or the plaintiff). Neither side indicated an intention to call any witnesses and the court was not requested to call any witnesses. The matter was argued on the basis of their respective particulars of claim.

[21] Counsel for the plaintiff argued that no basis was contended for the appellant's ownership of the attached goods, except the bare assertion of being true owner of the goods and that they had been 'erroneously' attached as belonging to the judgment debtor, Marigold Hotels.

[22] Counsel for the plaintiff argued that the High Court was correct in finding that insufficient evidence had been set out in support of the claim of ownership of the goods and the court's approach was thus correct and that the appeal should be dismissed on that basis. Counsel also accepted, in response to a question from the court, that if the appellant had no basis to invoke rule 113, the appellants claim to the goods would fall to be dismissed for that reason as well.

The nature of interpleader proceedings

[23] Interpleader proceedings, as provided for in rule 113 of the Rules of the High Court, are the means to adjudicate rival claims to property which is attached in the course of executing a judgment, as occurred in this instance. It is clear from rule 113 that it contemplates an expeditious procedure to determine rival claims to property which has been attached in execution.¹

[24] Given the way in which execution occurs, interpleader proceedings are invariably brought by the deputy sheriff as applicant to obtain a ruling from the court concerning the rival claims made upon attached goods. The applicant's interpleader notice in accordance with rule 113 calls upon the rival parties to file particulars of claim for their respective claims to the attached goods, warning that the failure to file same or to appear may result in a claimant being barred.

[25] Claimants are required to set out their particulars of their claim to the goods by providing the material facts which are the basis of their claim and set out a valid cause of action.² The court's powers in dealing with interpleader proceedings are set out in rule 113(10) as follows:

'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;

¹ A C Cilliers, C Loots and H C Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* Vol 1 5 ed (2009) at 336.

² Petrus T Damaseb *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice*, 1 ed (2020) at 341-345.

- (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.'

The interpleader proceedings before the High Court

[26] In this instance, neither party applied to lead evidence and merely argued their respective cases on the papers filed of record. The plaintiff as judgment creditor set out the litigation history and attached the particulars of claim and pointed out that the attached goods were the very goods which were sold and in respect of which the outstanding balance had been claimed in the action.

[27] The appellant merely asserted ownership of the goods without placing any supporting averments or documentation in support of that claim, asserting that the defendant against whom summary judgment was granted did not have legal personality.

[28] The High Court has in respect of interpleader proceedings made it clear in *Deputy Sheriff of Tsumeb v Koch & another*³ that a claimant is required to set out the material facts upon which its claim to the goods is based.

[29] In the absence of any request for the leading of evidence, the court made its determination based upon the particulars of claim and papers filed. It was entitled to do so in the absence of the parties seeking to call witnesses.

[30] The appellant, which was called upon to put forward facts in its particulars of claim in support of its claim to the goods, elected not to seek to lead evidence and cannot subsequently complain when it failed to set out any factual matter in its particulars of claim for its bald and unsupported assertion of ownership.

[31] The court was entitled to reject its unsupported claim in the circumstances. For this reason alone, the appeal falls to be dismissed.

[32] There is however a more fundamental reason why the appeal and the appellant's invocation of interpleader proceedings must fail. It is evident from the uncontested facts which served before the court that the appellant had absolutely no basis to invoke interpleader proceedings and that its attempt to do so was contrived and completely without foundation.

³ *Deputy Sheriff of Tsumeb v Koch & another* 2011 (1) NR 202 (HC) para 8.

[33] The particulars of claim in the action after all cited a firm, Marigold Hotels, as defendant, accompanied by a notice in terms of rule 42 of the rules of the High Court. That rule envisages and deals with the position when proceedings are instituted against firms. The rule defines a firm to include a business carried on by a body corporate. It expressly provides in rule 42(2) that a firm may be sued in its name.

[34] Pertinent to present proceedings is rule 42(5) which provides:

'A plaintiff suing a firm or a partnership may at any time before or after judgment deliver to the defendant a notice calling for particulars as to the full name and residential address of the proprietor or of each partner as at the relevant date.'

[35] In this instance the plaintiff sued the firm Marigold Hotels, as is permitted by rule 42(2), and delivered a notice under rule 42(5) to that defendant calling for particulars of the proprietor.

[36] In response to the plaintiff's notice in terms of rule 42(5), (6) and (7), the defendant's legal practitioner provided what was termed 'our client's registration document', attaching a certificate of the appellant's name change from Marigold Investments Two (Pty) Ltd to Marigold Hotel Developer (Pty) Ltd. In its formal notice in response to the notice, the defendant's legal practitioner stated:

'The defendant refers to the plaintiff's notice in terms of rule 42 dated 21 May 2019 and replies as follows there to:

“1. The particulars of directors of the defendant, same being Marigold Hotel Developer (Pty) Ltd, as at the relevant date are as follows:

1.1 QIAOXIA WU, with residential address being at No. 12 Robyn Street, Eros Park, Windhoek;

1.2 SONGGEN HUANG with residential address being at No. 12 Robyn Street, Eros Park, Windhoek.”
(Emphasis supplied).

[37] The appellant’s directors were served with a notice referring to Form 15 as contemplated by rule 42(7) by the defendant’s legal practitioner which calls upon a party in the position of the appellant to provide a notice to defend, if it disputes its liability as owner or proprietor of the defendant firm and that it was a partner or proprietor of the firm. The last paragraph of Form 15 is of relevance to these proceedings:

‘If you do not give such notice you will not be at liberty to contest any of the above issues. If the above-named defendant is held liable you will be liable to have execution issued against you, should the defendant’s assets be executed in execution and be insufficient.’

[38] Rule 42(9) is also relevant to these proceedings. It provides:

‘A person served with a notice in terms of subrule (7) or (8) must be regarded as a party to the proceedings with the rights and duties of a defendant.’

[39] Not only does rule 42(9) provide that the appellant, thus served with a notice under rule 42(7), must be regarded as a party to the proceedings with the rights and duties of a defendant, but the defendant's own legal practitioners accepted that Marigold Hotel Developer (Pty) Ltd was the defendant and listed its directors and their address and provided notices under rule 42(7) to those directors.

[40] Overlooked by both sides in this dispute, is the clear wording of s 23 of the High Court Act 16 of 1990 which provides under the margins heading 'Execution of process in respect of association, partnership or firm':

'Any warrant or other process for the execution of any judgement or order issued against any association of persons, corporate or unincorporate, or any partnership or firm may be executed by attachment of the property or assets of such association, partnership or firm.'

[41] The goods which were attached were those sold and installed at the instance of the firm cited as the defendant.

[42] The approach of the appellant in subsequently asserting in the interpleader proceedings that it was not a party to the proceedings is in direct conflict with what is provided for in rule 42(7) and (9) and the purpose of that rule. But even worse for the appellant, its approach is utterly untenable, given the clear and unambiguous concession that it is in fact the defendant, made on its behalf by its erstwhile practitioners in the reply to the notice in terms of rule 42(5), (6) and (7) dated 6

August 2019. Its claim is not only baseless on the facts read with rule 42, but further exposed as baseless by virtue of s 23 of the High Court Act.

[43] The appellant is thus the defendant for the purpose of the action and the execution of the ensuing summary judgment, as is reinforced by s 23 of the High Court Act.

[44] The claim by the appellant to invoke interpleader proceedings to the goods made to the deputy sheriff is thus entirely contrived, baseless and contrary to the facts. Its untenable nature is further demonstrated by the fact that the attached goods are the subject matter of the sale in the particulars of claim whose delivery was duly signed for and where one of the appellant's directors acted on behalf of the defendant in the purchase of the goods. There is palpably no basis whatsoever for a claim to the goods on the basis contended for in the appellant's particulars of claim in the interpleader proceedings.

[45] As acknowledged on its behalf that the appellant is the defendant in the action, plainly execution would then proceed against it, as is emphatically spelt out in Form 15 issued under rule 42(7). The invocation of interpleader proceedings is thus without any conceivable basis at all and has only served to delay execution and frustrate the administration of justice. The defendant (the appellant) had been found to have entered an appearance to defend solely to delay the matter when summary

judgment was granted. Being without any basis to invoke interpleader proceedings, the only inference to be drawn is that it is a yet further delaying tactic and thus constitutes an abuse of process. The appellant's counsel was afforded the opportunity to make submissions as to why a punitive costs order should not be made in the circumstances. Counsel referred to the rule 42(7) notice which were given to the directors of the appellant and not the appellant itself. But that notice was given by the defendant's erstwhile legal practitioners who had already acknowledged and accepted that the appellant was the defendant. The appellant thus had notice of the consequence of being held liable and that execution could be levied against it.

[46] Given the baseless and contrived nature of the appellant's claim which has only served to unduly delay the plaintiff's entitlement to execution for close to four years, there is no reason why the plaintiff should be out of pocket on appeal in defeating this utterly contrived point taking. Baseless point taking of this nature which only serves to delay proceedings will not be countenanced. As a mark of this Court's disapproval of tactics of this kind an appropriate punitive cost order is warranted. The beneficiary of this delay is the appellant which will be directed to pay the costs in this instance, although there may be circumstances which could justify cost orders against legal practitioners personally when engaging in dilatory tactics which constitute an abuse of process. This is not such a case. A cost order on the scale as between legal practitioner and own client is in my view warranted against the appellant in the circumstances in respect of the costs of this appeal.

Order

[47] The following order is made:

- (a) The appeal is dismissed with costs.
- (b) The appellant is directed to pay the second respondent's costs on appeal which include the costs of one instructed and one instructing legal practitioner on the scale as between legal practitioner and own client.

SMUTS JA

SHIVUTE CJ

FRANK AJA

APPEARANCES

APPELLANT:

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SECOND RESPONDENT:

A van Vuuren

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