



CASE NO.: I 2426/2007

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE ACTING DEPUTY SHERIFF OF ONDANGWA****APPLICANT**

and

**MUDAR INVESTMENTS CC****FIRST CLAIMANT**

and

**ONDANGWA PLASTIC CONVERTERS CC****SECOND CLAIMANT****CORAM: SMUTS, J**

Heard on: 25 June 2012

Delivered on: 26 June 2012

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**JUDGMENT**

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**SMUTS, J.:** [1] This is an interpleader application initiated by the Deputy-Sheriff for the district of Tsumeb and Ondangwa. He did so following an attachment of a mechanical horse vehicle and two trailers in possession of the judgment debtor, Mr D. S Christiaans. The attachment was effected on 24 November 2010. That led in turn to an interpleader claim by the first claimant, a close corporation, with its affidavit deposed to by the judgment debtor, Mr Christiaans. In it, he claimed that all three items were property of the first claimant. Attached to the affidavits was a certificate issued by Natis

indicating that the first claimant was the registered owner of the mechanical horse. The claim was made on 3 December 2010 after the attachment was made on 24 November 2010.

[2] Particulars of claim were subsequently filed by the first claimant. Its claim to the horse and a single trailer was contested by the second claimant, the judgment creditor. There then followed case management before Ungengu, AJ, after some postponements, the matter was set down for hearing on 25 June 2012.

[3] At the hearing, Mr Namandje who represented the first claimant stated that the first claimant only sought relief in respect of the mechanical horse. He called the judgment debtor, Mr Christiaans, to give evidence in support of its claim. Mr Christiaans initially testified that the first claimant had purchased the mechanical horse in 2006 in South Africa. Later in his evidence he said that it was purchased in 2010. In cross-examination he could not explain the registration certificate which indicated that it was first registered by NATIS in 2009 already.

[4] In his evidence in chief, Mr Christiaans further stated that the first claimant had after attachment sold the mechanical horse (during 2011) to another entity, Onamahongwa Trading CC in which he was a member together with two other persons. He further stated that the notice of attachment was not served on him personally and its contents were not personally explained to him by the Deputy-Sheriff. This is borne out by the notice of attachment dated 24 November 2010 which was not signed by him. But

that very notice gave rise to the interpleader claim launched by the first claimant on 3 December 2010 by way of an affidavit deposed to by Mr Christiaans on 2 December 2010. Prominent in the notice attachment is the the warning that the attached goods may not sold or removed and must be held available for a sale in execution. This admonition (and concomitant duty) are central to proceedings to execute judgments of this court.

[5] I asked Mr Namandje whether an adverse inference is to be drawn against Mr Christiaan and/or the first claimant by purporting to dispose of the vehicle in the face of this warning, which serves to undermine the very essence of execution proceedings and thereby the rule of law. Mr Denk representing the second claimant ( the execution creditor) contended that a special order of costs should be made against the first claimant as a result of his conduct. Mr Namandje argued against this because a lack of good faith was not specifically put to Mr Christiaans in the course of cross-examination, referring to the purpose of cross-examination as lucidly explained in *President of the Republic of South Africa v South African Rugby Football Union*<sup>1</sup>. But in view of the conduct in question, it would not in my view be necessary to expressly put an imputation of impropriety to Mr Christiaans given the warning contained in the notice and by reason of the provisions of s32(e) of the High Court Act, 16 of 1990 ( the Act) which I refer to below.

[6] Mr Namandje however conceded, entirely correctly in my view, that the interpleader claim by the first claimant cannot succeed by reason of Mr Christiaans

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<sup>1</sup> 2000 (1) SA 1 (cc) at par. 61-64

evidence and the current disavowal of ownership. I pause to point out that Mr Christiaan had stated in answer to a question by the court that he is the sole member of the first claimant.

[7] Plainly the first claimant can no longer lay any claim to the mechanical horse following Mr Christiaans testimony that the first claimant had sold the vehicle after attachment. It follows that the claim made by it must fail and fall to be dismissed.

[8] At the conclusion of argument, I adjourned in order to have further regard to the rules and authorities cited. In having regard to the rules, I have also had regard the provisions of the Act and in particular section 36(c) which makes it an offence for any person:

*“being aware that goods are under arrest, interdict or attachment by order of the court, makes away with or disposes of those goods in a manner not authorised by law, or knowingly permits those goods, if in his or her possession or under his or her control, to be made away with or disposed of in such a manner.”*

[9] The conduct of Mr Christiaans and the first claimant would thus not only be in conflict with the clear warning contained in the notice of attachment which the first claimant represented by Mr Christiaans had acted upon in bringing these proceedings, but would also appear to constitute a contravention of s32(e) of the Act. A transaction in conflict with this provision may also tainted with illegality. But that question is not before me and is left open.

[10] What is before me is an entirely unsustainable interpleader claim by the first claimant which falls to be dismissed with costs. In view of the conduct of Mr Christiaans and the first claimant in seeking to dispose of the vehicle while under attachment, it would seem to me upon careful reflection that a special order as to costs is indeed warranted as a mark of this court's censure of that conduct in apparent conflict with the Act and certainly with the warning contained in the notice of attachment, reflecting duties which arise from s32 of the Act.

[11] In the view of such conduct, I also direct the Registrar to bring Mr Christiaans' and the first claimant's conduct to the attention of the Prosecutor-General.

[12] I accordingly make the following order:

- (1) The first claimant's interpleader claim is dismissed.
- (2) The first claimant is directed to pay the second claimant's costs on the scale as between legal practitioner and client and to include the costs of one instructing and one instructed counsel.
- (3) The Registrar is directed to forward a copy of this judgment to the Prosecutor-General.

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**SMUTS, J**

**ON BEHALF OF THE FIRST CLAIMANT:**

**MR NAMANDJE**

**Instructed by:**

**SISA NAMANDJE & CO. INC.**

**ON BEHALF OF THE SECOND CLAIMANT:**

**ADV DENK**

**Instructed by:**

**BEHRENS & PFEIFFER**