

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-MOT-GEN-

2022/00021

In the matter between:

CHRISTOPH SHINANA

APPLICANT

and

ANDALBERD UUGWANGA SHILONGO

1ST RESPONDENT

SAHALA CASH LOAN CC

2ND RESPONDENT

REGIONAL MANAGER: ROADS AUTHORITY

NATIS SUB-DIVISION

3RD RESPONDENT

THE STATION COMMANDER:

ONGWEDIVA POLICE STATION

4TH RESPONDENT

Neutral citation: *Shinana v Shilongo and Others* (HC-NLD-CIV-MOT-GEN-2022/00021) [2024] NAHCNLD 28 (15 March 2024)

Coram: MUNSU J

Heard: 06 October 2024

Delivered: 15 March 2024

Flynote: Practice – Applications and motions – *Rei vindicatio* – Applicant seeking return of motor vehicle in possession of lender.

Summary: In this court's Main Division, the applicant had instituted action proceedings against the first respondent. He sought, among others, the immediate return of his motor vehicle. The court found that the plaintiff was not entitled to any of the relief sought and dismissed the claim. Subsequently, the applicant brought this application, seeking an order compelling the first and second respondents to return his motor vehicle, as well as ancillary orders.

The applicant owes the first respondent an amount advanced to him as a loan. The loan was advanced in order to save the applicant's motor vehicle from being repossessed by a financial institution. The applicant has not made any repayment to the first respondent in respect of the loan. The first respondent is in possession of the applicant's motor vehicle and maintains that the motor vehicle was pledged as security for the loan. The applicant claims that the only condition in respect of the loan was that he would repay the loan when his financial situation improved sufficiently. In resisting the relief sought, the respondents contended that the application constitutes *res judicata*.

Held, that the cause of action and the relief sought by the applicant in this matter are the same as those in the action matter he instituted, which was dismissed by this court's Main Division.

Held, that the only 'new' prayer in the present matter, is for an order to restore the registration of the motor vehicle in the applicant's name, which is incidental to the main one, of whether the applicant is entitled to the motor vehicle.

Held, the doctrine of *res judicata* prohibits parties from re-litigating a claim or defence that has already been decided.

Held, that, in any event, a dispute arose on the facts, in respect of the terms of the loan agreement, which cannot be decided on the papers.

Held, that in motion proceedings, the respondent's version is to be accepted on the disputed facts unless it is farfetched or it can be rejected simply on the papers, which is not the case in this matter.

ORDER

1. The application is dismissed with costs.
2. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MUNSU J

Introduction

[1] This is an opposed motion in terms whereof the applicant seeks an order compelling the first and second respondents to deliver to him the motor vehicle, a Volkswagen Amarok with VIN number VW1ZZZ2HZGAA047525 and engine number CSH165893.

[2] The applicant is Mr Christoph Shinana, a major male and resident of Eros, Windhoek. He is self-employed.

[3] The first respondent is Mr Andalberd Uugwanga Shilongo, an adult male businessman and resident of Ongwediva.

[4] The second respondent is Sahala Cash Loans CC, with place of business situated at Supersport Complex, Oshakati.

[5] The third respondent is the Regional Manager of NATIS, northern regions, with the regional office situated at Room 2, FNB Complex, Main Road, Ondangwa, cited herein for the interest it may have in the matter.

[6] The fourth respondent is the Station Commander of the Ongwediva Police Station. He is cited because the applicant laid a complaint in relation to this matter at the Ongwediva police station.

The application

[7] The applicant avers that he is the owner of the said motor vehicle in question. He states that he purchased the vehicle on 31 August 2016 at a price of N\$ 588,655.10, using financing from Standard Bank, and that he registered it in his name, with the licence number being N 607 UP.

[8] The applicant further states that sometime during 2021, the bank repossessed the motor vehicle due to outstanding instalments. He went on to state that on 31 August 2021 he informed the first respondent, who was a friend and someone with whom he had an agreement for a business partnership in the near future, about his predicament.

[9] The applicant claims that the first respondent, on the same date offered to lend him the funds to pay off the motor vehicle's outstanding debt and the bank's legal costs. He avers that he accepted the offer as the only requirement from the first respondent was that he would repay the loan when his financial situation had improved sufficiently.

[10] Additionally, the applicant states that the first respondent, on 02 September 2021 electronically paid the full outstanding amount of N\$ 275 487.69 directly to the bank on the applicant's behalf, which amount comprised of legal fees amounting to N\$12,270.11 and the outstanding balance of the hire-purchase loan plus interest amounting to N\$263,217.58.

[11] Furthermore, the applicant asserts that the bank restored possession of the motor vehicle to him on the same date after the payment was made.

[12] Moreover, the applicant states that on 03 September 2021, the first respondent asked if he could borrow the motor vehicle as his motor vehicle was going in for service and had errands to run in town. For this reason, the applicant lent him the motor vehicle on that same day.

[13] The applicant further claims that on 04 September 2021, the first respondent called to inform him that he had driven with the vehicle to Oshakati. The applicant explains that given the business relationship, mutual friendship and trust between him and the first respondent, he never bothered and did not demand the return of the vehicle.

[14] In addition, the applicant claims that the first respondent then said that he would return the vehicle in a few days, and that he would meanwhile arrange with the garage where his motor vehicle was being serviced, to call the applicant as soon as his motor vehicle's servicing was done so that the applicant could fetch it and use it for transportation in the interim.

[15] The applicant adds that after a week, he called the first respondent and asked him to return the motor vehicle, to which he replied that he would not give it back unless the applicant paid him back. Since then, the applicant claims, the first respondent has failed and refused to cooperate or return the motor vehicle, a refusal that he continues to maintain despite repeated demands through calls, texts, and letters addressed to him.

[16] The applicant continued by saying that on May 30, 2022, he caused a summons to be issued in the Main Division of this court against the first respondent (under case number HC-MD-CIV-ACT-OTH-2022/02228), in which he sought the motor vehicle's immediate return, an inspection, a diagnostic test, and, in the event that mechanical

defects were discovered, an order for the first respondent to pay for the repairs of the vehicle's mechanical defects and to replace all of the tyres with new ones. Additionally, the applicant requested payment of N\$ 170,000, which represents the financial losses he has incurred since 4 September 2021.

[17] Furthermore, the applicant avers that on 21 July 2021 the court dismissed his claim mainly because, according to the presiding judge, the applicant did not indicate when he was going to repay the loan.

[18] Moreover, the applicant states that on 08 August 2022 his friend named Foibe Nuule informed him that she had seen the first respondent driving the said motor vehicle around Oshakati and that it had a new licence plate number, N 992 SH. He avers that on 12 August 2021 he attended to NATIS at Outapi where it was confirmed that the vehicle was now registered in the second respondent's name with the licence number N 992 SH. The applicant believes that the first respondent is the owner of the second respondent.

[19] The applicant concludes by stating that he believes that the first and second respondents are now in a position to trade the motor vehicle with innocent or bona fide persons who are unaware of the true facts pertaining to the motor vehicle's ownership. Additionally, he states that the motor vehicle needs regular service, at 10 000 km intervals, as failing to do so could result in extensive damage to the engine as well as the motor vehicle's electronics. He claims that he had once seen the first respondent's wife driving the motor vehicle in Outapi. He adds that to the best of his knowledge the first respondent was in Windhoek at the time and might not have been aware of what was going on.

[20] Wherefore the applicant prays for the return of the motor vehicle as well as ancillary orders.

The opposition

[21] The first respondent, Mr Andalberd Shilongo (Mr Shilongo), who is also the managing member of the second defendant deposed to the answering affidavit on behalf of the first and second respondent. He avers that on 02 September 2021, he entered into a verbal loan agreement with the applicant. The terms of the loan agreement were that the first respondent was to lend the applicant an amount of N\$ 263,217.58, which would then be paid to Standard Bank to settle the applicant's loan account that the applicant had with Standard Bank for a hire purchase agreement pertaining to the motor vehicle.

[22] Mr Shilongo further states that since the applicant was a good friend of his, they did not agree to monthly installments, and that instead the applicant was required to repay the loan amount in full by the end of October 2022. He claims that they agreed that the motor vehicle would remain in the possession of Mr Shilongo until the applicant would have paid the amount, which he has to date failed to do.

[23] Mr Shilongo adds that, given that the applicant's claim was already dismissed by this court, the issue(s) are *res-judicata* and the applicant is merely abusing the court process.

Submissions by the parties

[24] Mr Kandara for the applicant submitted that the applicant satisfied three requirements that an owner of a thing has to prove in a vindicatory claim, namely:

- (a) He is the owner of the motor vehicle in question. Counsel submitted that the applicant became the owner of the vehicle on 02 September 2021 when he settled his obligations in terms of the hire-purchase agreement;
- (b) The motor vehicle was in the possession of the first respondent at the commencement of the proceedings; and
- (c) The motor vehicle is still in existence and clearly identifiable.

[25] Counsel contended that the owner of a thing has a right to possess, use, enjoy, and destroy as well as to alienate it. He added that if any of these things are infringed,

he has appropriate remedies such as in this case a *rei vindicatio*. Relying on *Chetty v Naidoo*¹ he argued that the *res* should normally be with the owner and it follows that no other person may withhold it from the owner unless such person is vested with some right enforceable against the owner (i.e. a right of retention or a contractual right). Mr Kandara further submitted that, even if it were to be assumed that the motor vehicle was pledged as security for the loan, and the first respondent relied on such purported lien and caused the motor vehicle's registration to be transferred into the second respondent's name, each of the respondents have by operation of the law become disqualified from holding such lien.

[26] It was counsel's submission that the dismissal of the applicant's action at the court's Main Division does not preclude the present proceedings, since:

- a) the cause of action (essentially the *mandament van spolie* in that matter) is different;
- b) a different set of facts, at least in part, are relied on herein; and
- c) the court in the previous matter did not issue a judgment *in rem* pertaining to the *res*.

[27] Mr Amoomo for the first and second respondent stressed that this matter is a classic case of forum shopping. He submitted that as soon as the applicant received a judgment against him in the Main Division, he immediately brought the same matter to the court's Northern Local Division.

[28] Counsel went on to argue that, it is well established in our law that once a court has duly pronounced a final judgment, it becomes *functus officio*; its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases.

[29] Mr Amoomo further contended that this court cannot be compelled to make a different and conflicting pronouncement, lest we find ourselves in a situation such as in

¹ *Chetty v Naidoo* 1974 (3) SA 13 (A).

*Menzies*² wherein the respondents relied on one judgment to support their argument that there was no unlawful dispossession, while the applicant relied on a different judgment of the same court to support its argument that there was unlawful dispossession.

[30] Counsel further submitted that to date, no payment has been made, so, the motor vehicle should remain in possession of the first and second respondents as collateral. In fact, it was contended that the motor vehicle was “pawned / pledged”. Counsel, however, drew attention to the fact that he had advised the first respondent that the motor vehicle should not have been registered under the name of the second respondent.

Discussion

[31] The cause of action and the relief sought by the applicant in this matter are the same as those in the action matter he instituted, which was dismissed by this court’s Main Division. In both matters, the relief sought includes: the immediate return of the motor vehicle; an inspection; a diagnostic test, and in the event that mechanical defects were to be discovered, an order for the first respondent to pay for the repairs of the vehicle’s mechanical defects, as well as to replace all the tyres with new ones. Additionally, in both matters, the applicant requested payment of N\$ 170,000, which represents the financial losses he allegedly incurred since 4 September 2021.

[32] The only ‘new’ prayer in the present matter is for an order to restore the registration of the motor vehicle in the applicant’s name. This prayer, however, is incidental to the main one, of whether the applicant is entitled to the motor vehicle, as standing on its own, is of no consequence in as far as the delivery of the vehicle to the applicant is concerned.

² *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Limited* (HC-MD-CIV-MOT-GEN-2023/00376) [2023] NAHCMD 540 (01 September 2023).

[33] Suffice to add that, in the particulars of claim filed at the Main Division, the applicant (plaintiff in that matter) also alleged that the first respondent (defendant in that matter) continued to unlawfully drive the motor vehicle without permission. Even so, the court still found that the applicant was not entitled to any of the relief he sought, and that order is extant. Thus, in light of the ruling, there is a difference between the circumstances surrounding the loan agreement, which may determine who may possess the motor vehicle, and the circumstances surrounding 'what could be happening to the vehicle while in the possession of that party'.

[34] In dismissing the claim, the court had the following to say:

'On the pleadings filed by the plaintiff(s), the plaintiff owes the defendant the amount of N\$ 275,487.69 advanced to him on 3 September 2021. The loan was advanced, in favour of the plaintiff, in order to save the plaintiff's vehicle from being repossessed by a financial institution. The plaintiff has not made any repayment to the defendant in respect of that loan, to date. The defendant allegedly is in possession of the plaintiff's motor vehicle and refuses to hand it over to the plaintiff until the loan is fully paid. The plaintiff seeks, among other things, an order compelling the defendant to restore the motor vehicle to the plaintiff. The plaintiff makes no offer to pay back the loan, against delivery of the motor vehicle. On the papers filed, the plaintiff is not entitled to any of the relief he claims. Even though, according to plaintiff's version, the parties did not agree on repayment date of the loan, it is trite law that the loan be repaid within reasonable time.

It will not serve the interests of justice in the circumstances to order the defendant to restore the vehicle to the plaintiff, when the plaintiff seemingly has no intention to pay back the loan.'

[35] Thus, the matter was dealt with on the merits and the court made a final order. The applicant then approached this court seeking the same relief, including an incidental one. To order differently based solely on the incidental prayer, would amount to circumventing the pronouncement made by this court, which has not been upset, either by way of rescission or appeal. Undoubtedly, that will create uncertainty.

[36] The doctrine of *res judicata* (a matter judged) prohibits parties from re-litigating a claim or defence that has already been decided. This is founded on public policy which requires that litigation should not be endless, and does not permit of the same thing's being demanded more than once. The authority relied on by the applicant in defence³, does not advance the applicant's case other than to confirm the application of the doctrine *res judicata*. It is my considered view that the application stands to be dismissed for constituting *res judicata*.

[37] In any event, the terms of the loan agreement are not common cause between the parties. While the applicant alleged that the only condition attached to the loan was that the applicant would repay the loan when his financial situation had improved sufficiently, the respondents' stance is different. They maintained that the applicant was required to repay the loan by the end of October 2022, and that the parties agreed that the motor vehicle would remain in the possession of the first respondent as collateral until the applicant would have repaid the amount, which he has to date failed to do.

[38] The respondents deny that the loan was extended to the applicant without collateral. They asserted that:

'No person in his right mind will loan such a high amount on such vague conditions. In any event those conditions will render the contract invalid for the lack of clarity and certainty.'

[39] Thus, a dispute arose on the facts, which cannot be decided on the papers. In motion proceedings, the respondent's version is to be accepted on the disputed facts unless it is farfetched or it can be rejected simply on the papers⁴, which I do not find to be the case.

Costs

³ *Isedor Skog N.O. & Others v Koos Agullus & Others* (797/2021) [2023] ZASCA 15; [2023] 2 All SA 631 (SCA); 2024 (1) SA 72 (SCA) (20 February 2023).

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); *Bahlsen v Nederlof and Another* 2006 (2) NR 416 at 424E-G, para 31; *Republican Party v Electoral Commission of Namibia* 2010 (1) NR 73 (HC) at 108C; *Permanent Secretary of Finance v Selfco Fifty-one (Pty) Ltd* 2007 (2) NR 774; *Mostert v Minister of Justice* 2003 NR 11 (SC) at 21G-I.

[40] Costs to follow the event.

The order:

[41] For these reasons, I make the following order:

1. The application is dismissed with costs.
2. The matter is removed from the roll and is regarded as finalised.

D C MUNSU
JUDGE

APPEARANCES

APPLICANT:

J Kandara
Of Kandara Incorporated
Ongwediva.

1st & 2ND RESPONDENT:

K Amoomo
Of Kadhila Amoomo Legal Practitioners.
Windhoek.