REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

***EX TEMPORE* JUDGMENT**

Case no: A 161/2015

In the matter between:

1.1.1.1.	**EMGARD COETZEE**
	APPLICANT
And	
ROUCO AUTO MANUFACTURERS (PTY) LTD	**1st RESPONDENT**
DEPUTY SHERIFF – WALVIS BAY (ANDRE VISSER)	**2nd RESPONDENT**
TOCOK INVESTMENTS CC	**3rd RESPONDENT**
PETRUS CORNELIUS ROUX	**4th RESPONDENT**
ROBERT COETZEE	**5th RESPONDENT**

Neutral citation: *Coetzee v Rouco Auto Manufacturers (Pty) Ltd (A 161-2015) [2015] NAHCMD 165 (9 July 2015)*

Coram: Schimming-Chase AJ

Heard: 9 July 2015

Delivered: 9 July 2015

***EX TEMPORE* JUDGMENT**

SCHIMMING-CHASE, AJ

(b) This is an urgent application for spoliatory relief. The applicant seeks an order directing the respondents to restore undisturbed and peaceful possession of a vehicle, namely a Syno dumper truck ("the truck") with engine number LZ…….. which, according to the applicant, was unlawfully "detained" in Walvis Bay by the first and fourth respondents (hereinafter referred at as "the respondents" unless reference is made to a specific respondent of the five respondents cited in this application).

(c) The second respondent is the deputy sheriff of Walvis Bay (referred to interchangeably as "deputy sheriff" or "second respondent"). Though an officer of the court[1] and cited herein, he has not opposed this application. The third respondent is Tokok Investments CC, a close corporation duly registered and incorporated in Namibia in accordance with the provisions of the applicable close corporation laws. The applicant's husband, to whom she is married out of community of property, is the sole member of Tokok Investments CC. The fourth respondent is a director of the first respondent, a company with limited liability registered and incorporated in Namibia in accordance with the applicable company law provisions. The fifth respondent is the applicant's husband. The applicant clearly averred in her founding papers that she and her husband conduct their affairs in their individual capacities, and that their estates are totally separate.

(d) In support of the relief sought, the applicant alleged at the outset that she

[1] Section 30 of the High Court Act No 16 of 1990.

is the owner of the truck. She also went to great lengths and devoted a number of paragraphs in the founding papers to prove her ownership of the aforesaid truck. She further averred that prior to the "unlawful actions" of the respondents, she had overall control of the truck, and accordingly was in possession of same. The basis of her control and possession is in essence that she leased the truck to an entity named Back to Back Investments (Pty Ltd), which at all material times utilised the truck in its contract with China Harbour Engineering Company Ltd, a major contractor currently involved in the construction of the expansion of the Walvis Bay Port under the auspices of Namport in Walvis Bay.

(e) With regard to the lease agreement in respect of the truck (on which she claims rests her control over and right to possession of), the applicant alleged that during March 2015, she learned that a company called Back to Back Investments (Pty) Ltd was desirous of selling the truck. Her husband mentioned to her that there was an opportunity to purchase the truck because he was aware that she had been looking for an opportunity in the trucking opportunity for some time. The applicant's husband is incidentally also a shareholder in Back to Back Investments (Pty) Ltd. (**check lease agreement)**

(f) Although the date is not pertinently alleged in the papers, it is apparent that by 27 April 2015, the applicant became aware that the truck was "unlawfully confiscated". Her legal practitioners then addressed a letter to the deputy sheriff and the first respondent's legal practitioners informing them that her truck had been unlawfully obtained (confiscated). Demand was formally made for the immediate return of the truck, failing which she would lay a charge of theft and institute urgent proceedings.

(g) This letter was not responded to. Accordingly the applicant's legal practitioners transmitted further correspondence on 13 May 2015 to the first respondent along the same lines as the earlier letter referred to above, namely that the confiscation of the truck would result in charges of theft as well as urgent proceedings being instituted against the respondent. There was again no response to these letters.

(h) On 29 May 2015, the applicant discovered via newspaper advertisement that her truck was being sold in execution on 6 June 2015. She then discovered that her truck had been attached by the deputy sheriff.[2] From the respondent's papers, the truck was attached via writ of execution on 22 April 2015 already, in pursuance of a default judgment obtained in this court against Tokok Investments CC for the amount of N$25,000 on 19 February 2015.

(i)

(j) On 1 June 2015, the applicant's lawyers addressed further correspondence to first respondent, the deputy sheriff, as well as the legal practitioners of the first respondent. The deputy sheriff was *inter alia* requested to institute interpleader proceedings on the grounds of the applicant's ownership of the truck. Similarly this correspondence was not responded to.

(k) It would appear that the legal practitioner of the applicant finally had a conversation with the legal practitioner of the first respondent because from correspondence emanating from the applicant's practitioner dated 4 June 2015, there were discussions in terms of which the applicant would pay the debt of Tocok Investments even though it was not her debt. She also offered that instead, the first respondent attach another vehicle for the aforesaid debt, and that other building properties owed by her husband to the first respondent would also be returned to the first respondent, so that her truck could be released from attachment. Payment of N$25,000 was made to the first respondent's attorneys on 5 June 2015.

(l) Unfortunately by 10 June 2015 the truck was still not released from attachment, although it is common cause that it was not sold in execution on 6 June 2015 as per the newspaper advertisement. Again, correspondence was transmitted to the first respondent's legal practitioners attempting to find out why the truck was not released in terms of the agreement reached. The legal practitioners of the first respondent finally responded on 11 June 2015. In that correspondence, the legal practitioners for the respondents advised that the agreement was that the truck would be released, but that this was a reference to

[2]This allegation must be considered in light of her first correspondence having been addressed to the deputy sheriff on 27 April 2015 already. This is significantly not explained in the papers.

the sale in execution and not the judicial attachment. Legal and additional costs associated with the attachment including interpleader proceedings that had apparently been commenced were cited as a reason why the truck had not yet been fully released.[3]

(m) On 16 June 2015, the legal practitioner of the applicant responded to this letter, expressing extreme displeasure at this stance taken. Again, the threat was made to launch urgent proceedings.

(n) The application before court was launched on 2 July 2015, and set down for hearing on 8 July 2015. The respondents were served on or about 7 July 2015 but they opposed the application and filed answering papers. A substantial portion of the respondents' opposing papers, was devoted to an application to strike all allegations in the founding affidavit relating to the applicant's ownership of the truck, on the grounds that the allegations relating to ownership of the truck are irrelevant for purposes of the determination of a spoliation application. In this regard, it is accepted that in applications of this nature, ownership is irrelevant, and that allegations do not contribute one way or another to a decision on such matter. However, I do not find in these circumstances that the respondents would be prejudiced[4] if the allegations are not struck, the law on what is regarded as relevant for purposes of adjudication of a mandament being clear. It would also not be necessary in the circumstances to respond to the allegations concerning ownership. The notice to strike is therefore refused with costs, it being noted that only half an hour of today's proceedings were devoted this argument.

(o) On the merits the respondents denied that they took any unlawful action, and averred that the tuck was lawfully attached by the deputy sheriff via writ of execution subsequent to default judgment being obtained by the first respondent against Tokok Investments in this court on 19 February 2015. The respondents also denied that the applicant was in possession of the truck at the time it was

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[3] The legal practitioner concerned does not appear to have considered the provisions of *iner alia* rule 104(3).

[4] Vaatz v Law Society of Namibia 1990 NR 332 HC.

attached. It was pointed out that the applicant resides in Khorixas, and the truck was in Walvis Bay at the time it was attached. The truck was leased to Back to Back Investments (Pty) Ltd in which her husband is a shareholder and was being used by Back to Back Investments in Walvis Bay. In the return of the writ of execution the following is *inter alia* instated:

> (p) "Please note that the keys of the truck is in the possession of Mr Coetzee. He was informed telephonically and he refused to cooperate."

(q) The respondents did not raise issue of urgency as a point *in limine* in their answering affidavit, nor was there a request for the court to consider whether the application was urgent or not before considering the merits. The only allegation raised regarding the issue of urgency is found towards the end of the answering affidavit in response to some of the paragraphs relating to a flurry of correspondence that preceded this application.

(r) This court has a discretion in terms of rule 73 to dispense with the forms and service provided for in the rules, to condone failure to comply with them and to hear the application on an urgent basis, at such time and place and in such manner as the court deems fit. It is set out clearly in rule 74 that an applicant must set forth explicitly the circumstances that she avers renders the matter urgent; and the reasons why she claims that she cannot be afforded substantial redress in due course.

(s) It is well established if not trite in our courts that for purposes of deciding urgency, the court's approach is that it must be accepted that the applicant's case is a good one and that the respondent was unlawfully infringing on the applicant's rights. Commercial urgency is well recognised in our courts, provided that the commercial urgency is sufficient to invoke the provisions of rule 73 of the rules of court. An applicant may, however, not rely on urgency created by her own inaction in bringing an urgent application and should therefore not delay in approaching the court, wait until a certain event is imminent and then rely on urgency to have her matter heard. Thus institution of proceedings should take place as soon as reasonably possible after the cause

thereof becomes known. The convenience of the court is a consideration that should not be ignored. There is a dislocation of a court roll and a jumping of the queue when an urgent application is heard. Other parties are waiting patiently to have their matters heard and are going through the case management process.[5]

(t)

(u) Although not clearly stated in the founding affidavit, the truck was attached in a writ of execution on 22 April 2015. From the flurry of correspondence, one must accept that the applicant first tried to engage the first respondent to resolve the matter amicably. The applicant can therefore not be penalised for not rushing to court immediately without trying to resolve the matter beforehand[6]. For some reason, the respondents' legal practitioners as well as the deputy sheriff (as officers of the court) failed to accord the applicant's legal practitioners the courtesy of a response. However, by 11 June 2015, it must have become clear to the applicant and her legal practitioners that the truck would not be returned or released from attachment. The correspondence of the applicant's legal practitioners dated 16 June 2015 was simply a regurgitation of the constant threat of urgent proceedings but yet the proceedings were not launched. Considering that a spoliation application involves the setting out of two main facts, namely possession and unlawful deprivation thereof, I hold the view that this application could have been launched earlier. However I cannot find that there was clear culpable remissness on the part of the applicant.[7] With regard to the second requirement, namely that the applicant must set forth reasons why substantial redress cannot be obtained in due course, it is clear from what I set out below that the applicant is very close to the line in satisfying this requirement. In the interests of finalisation of the matter and because it appears that no interpleader proceedings were launched by the deputy sheriff, condonation is granted and the application is treated as urgent.

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[5]Bergmann v Commercial Bank of Namibia Ltd 2001 NR 48 (HC) at 49H-50A; Mweb Namibia (Pty) Ltd v Telecom Namibia and Others 2012 (1) NR 331 (HC) at 340 par [22]; Jack's Trading CC v Minister of Finance and Another 2013 (2) NR 480 (HC) at 488 par [20].

[6]Mweb Namibia (Pty) Ltd v Telecom Namibia 2012 (1) NR 331 340 par [9].

[7]Bergmann v Commercial Bank of Namibia 2001 NR 48.

(v) Turning to the merits, it is well established that a *mandament* is a speedy remedy designed to restore possession of property to a person who has unlawfully been deprived thereof, and therefore to restore the status quo ante. An applicant for a *mandament van spolie*, must show (a) that she was in peaceful and undisturbed possession of the thing, and (b) that she was unlawfully deprived of that possession. This is because the philosophy underlying the law of spoliation is that no person is allowed to take the law into her own hands, and that conduct conducive to a breach of the peace should be discouraged.[8]

(w) The applicant alleges that she possessed and was in control of the truck by virtue of the fact that she is owner as well as lessor thereof. Counsel for the applicant relied on the supreme court decision of Kuiiri v Kandjoze[9], in which the Supreme Court held *inter alia* that a person can be deprived of possession even though they were not physically present.

(x) It is correct that physical control over a thing need not be exercised personally but may be exercised indirectly by a representative or a servant of the owner. Thus, a herdsman can exercise control on behalf of the owner of the cattle. Likewise a lessee can exercise control on behalf of the lessor.[10] It is to be noted, however, that the Kuiiri case involved spoliation of immovable and not movable property as in this case. The appellant in the Kuiiri case operated a bottle store and restaurant on premises leased from the respondents. It was made clear at the outset that they regarded themselves as owner of the leased premises. The appellants had sublet the premises to another but the liquor license was in the name of the second appellant. After that subletting agreement was terminated the sub-lessee returned the key to the son of the appellants. The respondents (who never had the keys) then padlocked the

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[8]Nino Bonino v De Lange 1906 TS 120 at 122; Boompret Investments (Pty) Ltd v Paardekaarl Concession Store (Pty) Ltd 1990 (1) SA 347 (A) at 353B-D quoted with approval by Maritz JA in Kuiiri and Another v Kandjoni and Others 2009 (2) NR 447 (SC) at par [2]-[4].

[9] 2009 (2) NR 447.

[10]LAWSA Vol 27 para 260, Kuiiri *supra* para 30

store.

(y) Due to the different factual scenario, the property involved and the circumstances of this case, it is unnecessary to consider the insightful concurring judgment of Maritz JA dealing with the possibility of the evolution of the law relating to whether a landlord has a right concurrently with a tenant to claim spoliatory relief in respect of leased premises against a third party for purposes of determination of this case. I find on the facts of this case that the applicant was not in possession of the truck. In any event, the applicant could have launched vindicatory proceedings, or applied to set aside the writ.

(z)

(aa) In any event, the truck was validly attached by the deputy sheriff in pursuance of the judgment in default and a writ of execution issued out of the High Court. It was not spoliated by the first and fourth respondents as alleged. The applicant's counsel tried valiantly, but was unable to submit that the attachment was unlawful or invalid. No application was launched to set aside the writ.

(bb)

(cc) On this basis, there cannot have been an unlawful dispossession, even if the applicant was in possession of the truck considering the amount owed and the property attached. I have not ignored the actions of the respondents and the deputy sheriff that are not disputed in the papers. Just the failure to respond to letters without explanation can constitute unprofessional conduct. However, in the absence of any evidence that the attachment was unlawful, the *mandament van spolie* cannot avail the applicant irrespective of what she suffers.

(dd) When a party adopts a certain procedure and cause of action to obtain relief, that specific cause of action adopted must be proved on a balance of probability. If it is not proved, the relief sought simply cannot be granted.

(ee) Both parties' counsel submitted that the deputy sheriff should be directed to commence interpleader proceedings.

(ff)

(gg) In light of the following the following order is granted

(hh)

(a) The application is dismissed with costs, such costs to include the costs of one instructing and one instructed legal practitioner.

(b)

(c) The second respondent is directed, if he has not done so already, to institute interpleader proceedings in terms of rule 113 within 7 days of this order being served.

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SCHIMMING-CHASE

Acting Judge

APPEARANCES

APPLICANT:	Mr T Phatela Instructed by Sisa Namandje & Co Inc
RESPONDENTS:	Mr SJ Jacobs Instructed by Van der Merwe-Andima Inc