

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

Case Title: Deputy Sheriff of Okahandja EB Cowley // Johannes Kweenda	Case No: HC-NLD-CIV-ACT-OTH 2018/00068 (INT-HC-INTERP 2019/00175)
	Division of Court: High Court, NLD
Heard before: Honourable Justice Damaseb, Judge President	Date of hearing: 25 February 2020
	Delivered on: 04 March 2020
Neutral citation: <i>Deputy Sheriff of Okahandja EB Cowley v Kweenda</i> (HC-NLD-CIV-ACT-OTH 2018/00068 (INT-HC-INTERP 2019/00175) [2020] NAHCNLD 33 (04 March 2020))	
The order: Having heard Ms Mugaviri, counsel for the first respondent, and Mr Toivo Shikesho acting in person, and having heard oral evidence of Mr Toivo Shikesho and Mr Japhet Shikesho and having read the documents filed of record: IT IS ORDERED THAT: The claim by Mr Toivo Shikesho (the claimant in an interpleader proceeding), to the attached vehicle with registration number N 35810 SH is dismissed and costs awarded in favour of the first respondent (Mr Johannes Kweenda) against the claimant. It is declared that the said vehicle is, in law, the property of the judgement debtor, Mr Japhet Shikesho, and is properly the subject of execution by the judgment creditor.	

Reasons for orders:

[1] On 9 May 2019, the deputy sheriff for Okahandja attached a vehicle with registration number N 35810 SH at the behest of Mr Johannes Kweenda (the judgement creditor) who, pursuant to a settlement with Mr Japhet Shikesho (the judgement debtor), obtained judgment and, upon default by the judgment debtor, obtained a writ of execution against Japhet Shikesho in the Northern local Division, Oshakati on 26 February 2019.

[2] Upon the deputy sheriff attaching the said vehicle, the judgement debtor advised the deputy sheriff that he was merely in possession thereof and that it belonged to his brother, Mr Toivo Shikesho (the claimant). The deputy sheriff thereupon issued an interpleader notice on 24 September 2019.

[3] The claimant then filed of record a statement in which he makes the assertion that he is the owner of the attached vehicle, together with a statement by Japhet Shikesho and one Katangolo. Katangolo is the person, it is common cause, who previously owned the attached vehicle.

[4] When the interpleader was ripe for hearing, Ms Mugaviri for the judgement creditor applied to court for the matter to be referred to oral evidence. That request was granted and on 25 February 2020 when the matter was called, both the judgement debtor and the claimant testified and were cross-examined.

[5] The two witnesses essentially repeated the version appearing in the written statements filed in the interpleader. The claimant testified that he had made arrangements with the judgement debtor to purchase the vehicle for him from Katangolo. Since he had no driver's licence, he consented to the vehicle being registered in the name of the judgment debtor. He confirmed that the judgement debtor paid for the car from his own funds and only subsequently did he pay the amount of N\$ 79 000 to the judgment debtor as a reimbursement.

[6] In his testimony, the judgement debtor in support of the claimant's claim of ownership of the attached vehicle stated that he is not the owner of the attached vehicle. According

to him, Katongolo (the seller) is someone he knows very well. The seller had financial problems and approached him to see if he would be interested to buy the vehicle. He informed the seller that he already had a vehicle but would ascertain if the claimant might be interested. He inspected the vehicle, took pictures of it and sent to the claimant who expressed interest and asked him to negotiate the purchase price which was then agreed to be N\$ 80 000. The claimant agreed. The claimant did not have the money at the time and asked the judgement debtor to pay and to be reimbursed later by the claimant when his funds invested in a unit trust will become available.

[7] It emerged at the hearing that (a) at the time the vehicle was bought from the seller, the judgement debtor was married in community of property, (b) the judgement debtor since the purchase of the vehicle until its attachment remained in possession of the vehicle, (c) the judgment debtor, not the claimant, took out insurance on the attached vehicle, (d) it was only after the vehicle was attached that the judgment debtor and the claimant took steps to have the attached vehicle transferred into the name of the claimant – clearly in breach of s 36 of the High Court Act 16 of 1990 which states that:

‘ 36 Any person who-

...

(c) 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; or

...

shall be guilty of an offence and liable on conviction to a fine not exceeding N\$ 1000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment’

[8] It follows that the claimant is coming to this court for relief with dirty hands.

[9] Although he did not appear and testify at the hearing, the seller, in a written statement purports to support the version that the actual purchaser was the claimant. The judgment debtor described the seller as a very close friend of his’. This raises the real danger that there could be collusion between him and the claimant and the judgment debtor- a

consideration which compels the court to approach their evidence and statements with great caution and test it carefully against the probabilities.

[10] The unpaid judgment creditor is duly represented by Ms Mugaviri. She, on behalf of the unpaid creditor, deposed to an affidavit making the following salient allegations.

[11] Ms Mugaviri alleged that Mr Japhet Shikesho is the lawful owner of the BMW with registration number N 35810 SH from the date of purchase up until the date of the questionable re-registration of the vehicle into claimant's name on 25 September 2019. She alleges that there is no proof that the claimant purchased the vehicle from the seller as there was no direct contact between the two. She maintains that the attachment was lawful and should stand. She further alleges that the claimant and the judgment debtor are in cahoots as the judgment debtor is avoiding settling his debt with the unpaid judgment creditor.

[12] The following aspects required reasonable and coherent explanations in view of the real prospect of collusion between the judgement debtor and the claimant and the seller: The claimant had never seen the car or the seller; the car was paid for by the judgement debtor; the claimant paid the amount of N\$ 79 000 to the judgement debtor well after the latter had paid the purchase prize to the seller; there is no written document evidencing either the transaction between the seller and the claimant or between the claimant and the judgement debtor in the event of a dispute arising; since its purchase the claimant who lived in the north while the judgement debtor lived in Okahandja, had no control over the car; the judgement debtor who already had a car of his own now also had control over the car allegedly bought by the claimant; either the claimant and the judgment debtor could with ease have established if the car could be registered in the claimant's name although he had no licence; there is no suggestion that there was any impediment to them finding out the correct legal position.

Analysis

[13] The claimant comes to the court with dirty hands and for that reason alone should not be assisted by the court. Besides, the probabilities are dead set against the claimant's claim and the version given by the two witnesses. The claimant's version that

he was unconcerned that any mishap was likely and that, for that reason, there was no urgency to transfer the vehicle into his name, beggars belief. How about if the vehicle was involved in an accident? By his own admission, the claimant did not take out insurance on the vehicle after it was bought, nor had he discussed the issue of insurance with the judgment debtor – in other words, he was prepared to assume the risk of loss from any cause such as theft or an accident. Is it probable for someone who buys what was described at the hearing as an almost new car to not take the trouble that the car was insured? We now know that the judgment debtor had taken out insurance on the vehicle in his own name and paid for it himself – the kind of instinctive conduct one would expect from an owner of a vehicle. The significance of this lies in the admission by the claimant that he took no proactive steps to insure the vehicle was insured. It became apparent that it was not because of the claimant's insistence that the judgment debtor insured the vehicle. If he truly was the owner one would expect that he would do so.

[14] Another important consideration is that the judgment debtor is, to the claimant's knowledge, a married man: As it happens, in community of property. The claimant gave the impression that he did not ascertain what marital regime the judgement debtor was married under. Is that really a probable attitude on the part of someone who buys an expensive car and has it registered in the name of a married brother? What are the probabilities that the two brothers would not have taken that into consideration and recorded the transaction for the claimant's protection, if the claimant was in reality the beneficial owner of the vehicle? Would a beneficial owner of a vehicle assume the risk of keeping it in the name of a brother who could be married in community of property – at the very least without some written proof evidencing that he was the actual owner? I think not!

[15] The duo made a poor impression on me in the witness box. Their explanations on very crucial failures had all the hallmarks of after-the-fact rationalisation. They offered explanations which are convenient and self-serving. For example, they did not satisfactorily explain why they chose not to have the vehicle registered in the claimant's name upon purchase or soon thereafter. They offered the obviously rehearsed explanation that they assumed that a person without a driver's licence could not have a car registered in their name. They both made no prior attempt to check with NATIS if indeed that were so although nothing prevented them from doing so. According to them,

they only by chance found out that their belief was mistaken at the time that the car was attached which is when, with great hurry, they went to NATIS to effect the transfer into the claimant's name.

[16] The allegations supporting the claimant's version that he is the actual owner are very convenient, coming as they do only after the vehicle was attached. The allegations are easy to make in order to frustrate the satisfaction of a judgment debt, yet very difficult of being disproved by the party whose interest it is intended to undermine. That is so because it rests on matters peculiarly within the knowledge of the judgment debtor and the person (a brother) with whom he makes common cause in defeating the execution.

[17] In the manner the allegations are made, based solely on mere say-so; and unsupported by objective facts and verifiable documentary evidence, there is no way the judgement creditor can ever displace the self-serving allegations made by two brothers whose outward actions are clearly contrary to the version that the claimant is the beneficial owner of the vehicle. The probabilities must therefore be the decisive consideration on the facts before me.

[18] On the contrary, the presumption operates in favour of the judgment creditor that the vehicle belongs to the person in whose name it is lawfully registered a NATIS, at the time the vehicle was attached by the deputy sheriff. To displace that presumption the claimant and the judgment debtor had to furnish cogent evidence of the claimant's ownership on a balance of probabilities. They failed to do so.

[19] When all the objective facts are placed in the scale and the probabilities are carefully assessed, the ineluctable conclusion is that it is more probable than not that the judgement debtor is the actual owner of the attached vehicle.

Disposal

[20] I am satisfied that the claimant has not made out a case on balance of probabilities that the beneficial ownership in the vehicle vests in him and not in the judgement debtor.

[20] The interpleader claim to the vehicle made by the claimant therefore falls to be

dismissed; and it is declared that the attached vehicle is, in law, available for execution at the instance of the judgement creditor.

Order

[21] The claim by Mr Toivo Shikesho (the claimant in an interpleader proceeding), to the attached vehicle with registration number N 35810 SH is dismissed and costs awarded in favour of the first respondent (Mr Johannes Kweenda) against the claimant. It is declared that the said vehicle is, in law, the property of the judgement debtor, Mr Japhet Shikesho, and is properly the subject of execution by the judgment creditor.

Judge's signature:	Note to the parties:
Counsel:	
CLAIMANT	RESPONDENT
In person	Ms Mugaviri Mugaviri Attorneys