Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Reportable: Yes
Of Interest to other Judges: Yes

27 March 2024 Vally J

CASE NO: 43929/2015

Acting Sheriff of the High Court Mahikeng **Applicant**

and

Dada Motors Mahikeng CC T/A Dada Motors **First Claimant**

Peolwane Properties (Pty) Ltd **Second Claimant**

Lobelo, Kagisho Lambert **Execution Debtor**

JUDGMENT

Vally J

[1] On 16 August 2018 the Acting Sheriff of the High Court, Mahikeng (Sheriff), issued an interpleader notice in terms of rule 58 of the Uniform Rules of Court in relation to a dispute regarding the ownership of a motor vehicle, a Bentley Continental GT (vehicle). The application results from the Sheriff attempting to perform his statutory duties by executing a writ of execution, issued by the second claimant, pursuant to it having secured a monetary judgment from this court against the execution debtor (writ). The writ was issued on 10 November 2017. Pursuant thereto, the Sheriff, on 13 November

2017, attached the vehicle. On 8 January 2018 the first claimant served an affidavit on the Sheriff claiming that it, and not the execution debtor, is the owner of the vehicle. Why the interpleader notice was only made on 16 August 2018 is not revealed in the papers. In any event, it is in the face of these competing, mutually exclusive claims, that the interpleader notice was issued.

[2] Having received the interpleader notice, both claimants needed to file their respective particulars of claim (particulars required of them in terms of the provisions of sub-rule 58(5)). This took place in September 2019 – more than a year after the interpleader notice was delivered. Their respective particulars are short, crisp and clear. Read together, they reveal the existence of a simple, single-issue dispute between the two claimants. Expressed as a question it is: who is the owner of the vehicle?

[3] Upon filing their respective particulars, the matter should have been placed before a court.[1] This did not occur. Had it occurred, the two claimants would have been required to appear before the court. The court is empowered to 'then and there adjudicate' over their respective claims after hearing 'such evidence as it deems fit.' This procedure favoured by sub-rule 58(6) is clearly designed to ensure expeditious finalisation of matters. The parties' respective evidences are to be presented to the court and the court ought to 'there and then' make its decision. This is so, because, amongst others, competing claims made on goods, money or immovable property attached by a Sheriff interfere with the Sheriff's ability to discharge his duties. Thus, the procedure does not envisage or expect the lengthy drawn-out process that is normally

[1] Sub-rule 58(6)(a)

pursued in a trial action, involving all the accompaniments of the pre-trial processes - such as discovery and request for further particulars for purposes of trial preparation and pre-trial conferences – necessary to get the matter to be trial ready.

[4] Once the matter is presented before a judge the judge may:

a. 'order that any claimant be made a defendant in any action already commenced …'[2]

b. 'order that any issue between the claimants be stated by way of a special case or otherwise and tried, and for that purpose order which claimant shall be the plaintiff and which shall be the defendant.'[3]

[5] This, as mentioned, did not take place here. Instead, on 8 October 2019, the second claimant delivered its discovery affidavit, but then did nothing until 3 November 2020 when it delivered an application in terms of rule 35 calling on the first claimant to deliver its discovery affidavit. On 20 November 2020 the first claimant filed its discovery affidavit.

[6] On 30 September 2022 the first claimant delivered what it styles a 'supplementary affidavit'. The deponent to the affidavit is the same person that deposed to the affidavit on 8 January 2018 – the one delivered in response to the writ claiming ownership of the vehicle. In this 'supplementary affidavit' he

[2] Sub-rule 58(6)(b)
[3] Sub-rule 58(6)(c)

expands upon his claim that the first claimant is the owner of the vehicle. There is, however, an important averment in this affidavit, which is to the effect that the vehicle was valued at R1 400 000.00 but has since, as a result of depreciation, diminished to R550 000.00. It is this kind of loss of value that an interpleader proceeding, which is designed for expeditious resolution of competing claims, could easily prevent. It must at this stage be emphasised that neither of the affidavits accompany a notice of motion seeking particular relief. However, as will be seen later, the second claimant contends, which the first claimant does not deny, that the first claimant regards the affidavits to constitute its evidence in support of an application to have the interpleader determined by way of application.

[7] On 2 February 2023, the second claimant served a notice in terms of sub-rules 35(3) and (6) seeking information concerning certain documents and tape recordings. In particular, the second claimant sought ‘copies of all statements of account in respect of all accounts held by the first claimant at any bank institution for the period August 2011 to May 2012’ (bank statements). This is the period that the first claimant claims it received partial payment for the sale of the vehicle. The next day, on 3 February 2023, the first claimant’s attorneys recorded in writing that the first claimant would not furnish the bank statements. They say in this regard: ‘Your client’s desperate attempt to delay the matter further with a request for further discovery is rejected and will be opposed.’

[8] On 28 February 2023 the second claimant delivered what it called its 'interpleader affidavit'. Its delivery is, no doubt, motivated by the filing of the two affidavits of the first claimant – the one of 8 January 2018 and the one of 30 September 2022 - and is meant to be a response to these two affidavits. Without responding to each and every averment in the two affidavits, this 'interpleader affidavit' does, however, present a diametrically opposite view regarding the ownership of the vehicle.

[9] More importantly, the second claimant takes umbrage at the filing of the two affidavits. It says:

> 'Uniform Rule 58 does not provide for the filing of affidavits in the interpleader process prior to the Court making a determination concerning how the matter shall proceed in terms of subsection (6). Notwithstanding the aforesaid, the first claimant has already filed two affidavits in this action.'

[10] The second claimant is correct. Once the respective particulars have been filed it is for the judge, and not the parties, to determine how the matter shall proceed. But this is not what happened, and to the extent that there can be any blameworthiness for this it would have to lie with both claimants' legal representatives. The second claimant's position is that the matter should proceed to trial. While the first claimant has filed two affidavits, it does not explicitly aver in any of its affidavits that the matter should be determined by way of application proceedings. Nevertheless, that it adopted this view becomes clearer in time. Its position is recorded in the next paragraph in the second claimant's affidavit:

> 'The second claimant has indicated to the first claimant that its position is that the interpleader summons must proceed to trial so that the issues can be properly ventilated and the various witnesses evidence

> tested by way of cross-examination and that it objects to the matter being determined on the affidavits.'

[11] The objection to the matter being determined on the affidavits is emphatically articulated by the second claimant in the paragraphs that follow.

[12] On 10 March 2023 the second claimant filed its discovered documents, and on 27 March 2023 the first claimant did the same. On 30 March 2023 the second claimant filed its heads of arguments on the issue of the ownership of the vehicle. The first claimant did not file its heads of argument. Instead, on 15 June 2023 - four and half months after the interpleader affidavit was delivered – it delivered a notice of motion of 'counterclaim' together with an affidavit which is designated 'Replying Affidavit and Founding Affidavit to Counterclaim.'

[13] A few concerns arise with regard to this notice of motion and the accompanying affidavit. They are:

a. The notice of motion is not presented in accordance with Form 2A of the First Schedule of the Uniform Rules of Court. The second claimant is not informed of the time period within which it should respond to thereto.

b. It is designated to be a 'counterclaim', but it is not clear what it is a counterclaim to. The two parties have already – a few years before the filing of this notice of motion – filed their respective particulars in the interpleader proceedings in which they both

make a claim to the vehicle. Strictly speaking, there is no claim and counter claim. There are simply two competing claims.

c. no application for condonation for the late filing of this 'replying affidavit' has ever been made.

[14] That said, the relief sought in this 'counterclaim' is for the writ to be 'rescinded', and the contents of certain paragraphs in the second claimant's 'interpleader affidavit' be struck-off on the grounds that they are 'scandalous, vexatious and/or irrelevant.' This application is brought five years after the notice was issued and six years after the writ was issued.

[15] The first claimant, after noting that, (i) the matter should be processed in terms of the provisions of rule 58, (ii) the two claimants have already filed their respective particulars and (iii) have also filed affidavits in the matter 'in which documents discovered have been made available', contends that the 'affidavits have crystallized the matter' allowing this court 'to adjudicate the claims by way of these affidavits'. There are two problems with this contention, namely:

a. The matter was not placed before a judge in terms of sub-rule 58(6), and it had not in all this time brought a formal application to have the matter determined on papers. Instead, it has only brought a 'counterclaim' in which it incorporates what it says is its 'replying affidavit' to the 'answering affidavit' of the second claimant.

b. The first claimant forgets that the second claimant complained that it (first claimant) has refused to discover pertinent documents and has issued a sub-rule 35(3) notice to force it to discover these documents.

[16] The first claimant contends that the writ should never have been issued because the order it is founded upon is not one for the payment of money. It is in substance one that requires Mr Lobelo to do something. The former order is normally referred to as an *ad pecunium solvendum* (to pay the money), and the latter as *ad factum praestandum* (to perform or desist from performing the deed).

[17] On 18 December 2023 – six months after receipt of the 'replying affidavit' incorporating a 'counterclaim' – the second claimant delivered its answering affidavit to the 'counterclaim'. No explanation is furnished as to why it was delivered late, and no condonation application was made. The answering affidavit itself is relatively short, but contains annexures that make the entire affidavit voluminous. The annexures include affidavits and sworn statements filed in matters between itself and Mr Lobelo, the execution debtor. Of particular importance is a sworn statement made by Mr Lobelo on 13 November 2017 in support of the claim by the first claimant that it is the owner of the vehicle. The sworn statement is in manuscript form. The full statement reads:

> 'I am not the registered owner of the Bentley Continental GT with licence number […] NW and vehicle regist… number […] NW. The

> vehicle's registered owner is Yusuf Dada of Dada Motors … The vehicle was given to me on loan.'

[18] While Mr Lobelo claims that he is not the registered owner of the vehicle, both claimants accept that he is the registered owner. The first claimant contends that while the vehicle is registered in Mr Lobelo's name (making him the registered owner), it is the actual owner. In addition, the first claimant claims that it is the actual owner because, while the vehicle was sold to Mr Lobelo, he has yet to pay the full purchase price. On this version, the vehicle was 'sold', albeit not fully paid for, to Mr Lobelo. On Mr Lobelo's version it was 'given to [him] on loan'. The two versions are not reconcilable.

[19] On 18 December 2023 the second claimant delivered its answering affidavit to the 'counterclaim'. It resists the 'counterclaim' on two grounds: (i) it is brought so late in the day that it should not be entertained; and, (ii) it is without merit.

[20] On 10 January 2024, the first claimant set the matter down for 12 February 2024 on the opposed motion roll. This is before it had delivered its replying affidavit in the 'counterclaim'. In fact, it delivered its heads of argument concerning the issues raised in the 'counterclaim' on 24 January 2024, and then filed its replying affidavit in the 'counterclaim' two days later on 26 January 2024. These heads are dated 6 October 2023.

[21] The first claimant's response to the contention that it should not be allowed to challenge the validity of the writ at this late stage is that it only

became aware of the defects in the writ when it received the interpleader affidavit (which it calls the answering affidavit), and therefore it cannot be faulted for only instituting the 'counterclaim' six years after the writ was issued. I explain below, why in my view, this explanation does not assist it.

[22] The real issue between the parties has always been the ownership of the vehicle. That is the issue the first claimant sought to have determined on the papers. The 'counterclaim' introduced another, precursor issue: the validity of the writ. When it set the matter down, and when it filed its practice note, the first claimant made it clear that it wished to have both issues determined at once. The validity of the writ should be determined first, and should it lose on that issue, then the second issue should be determined. However, at the hearing, after the matter stood down for a day, it changed its position. It asked that only the first issue – the validity of the writ - be determined by the court regardless of the outcome on this issue. The second claimant agreed with this approach.

[23] The 'counterclaim' was brought more than six years after the writ was issued. In the meantime, the first claimant had filed its particulars and three affidavits in the quest to make out its case that it is the owner of the vehicle. It has always accepted that the writ was valid. It has by its actions renounced its right to challenge the writ. It has to be remembered that it has maintained that it and the second claimant had already made discovery. While the second claimant has complained that the first claimant's discovery was inadequate, it (the first claimant) made no such allegation against the second claimant.

Nothing prevented it from, after exercising reasonable care, seeking any document or tape recording it believed the second claimant was withholding. On the contrary, it was the party that had been accused of withholding relevant documentation, such as its bank statements showing that it received payment for the vehicle from Mr Lobelo. It was all along satisfied with the discovery made by the second claimant. And, it conducted no investigation of its own, which would, amongst others, examine the papers before the court that issued the monetary judgment.

[24] Its claim that it was unaware of the defects in the writ until the 'interpleader affidavit' was filed does not assist it. The 'interpleader affidavit' contains nothing that is radically different from the claims of the second claimant in its particulars. As a reasonable claimant it should have had no difficulty in acquiring all the information regarding the writ from the moment it filed its particulars. If it did not act then, it could still have acquired it well before it filed its first affidavit. It simply did nothing to get the information it claims to have inadvertently acquired. If indeed it did not acquire the necessary information soon after it was presented with the writ, it must bear the consequence of that. It is, in other words, the author of its own misfortune.

[25] It cannot go unnoticed that the challenge to the writ at this late stage is severely prejudicial to the second claimant. Given the conduct of the first claimant, it was entitled to assume that there was no issue regarding the validity of the writ.

[26] It has been held as long ago as 1878 that if a person seeking to set aside a writ has delayed for a considerable time before bringing the application she may have renounced her right to object to the writ.[4] Even if it did not file its particulars and the affidavits that followed, I would still hold that by delaying for six years the first claimant has renounced its right to challenge the validity of the writ. Such a lengthy delay cannot under any circumstances be condoned regardless of how strong its case may be. A party that lacks the necessary vigilance to properly prosecute its case, as the first claimant has in this case, should bear the consequence of its inaction or lackadaisical attitude. It cannot be allowed to frustrate the course of justice by sitting on its hands. In my view, the sheer length of delay on the part of the first claimant results in it losing its right to mount the challenge. It is by any standard unjustifiable.

[27] On this finding there is no need to say anything about whether the writ is derived from an *ad pecunium solvendum* or *ad factum praestendum* order.

[28] Costs should follow the result.

[29] I conclude therefore that the first claimant is to be barred from challenging the validity of the writ.

[30] In closing, it is necessary to record that the way this matter was allowed to develop or evolve is nothing short of scandalous. What was meant to be a simple process in terms of rule 58 has turned out to be a complicated, long

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[4] *Wolstenholme v Boyes* 1878 Buch 175. See also: *MEC, Department of Public Works v Ikamva Architects* 2022 (6) SA 275 at [60]

drawn-out process consuming valuable time, money and judicial resources with no end in sight. The cause of this is the decision by the parties to depart from the process prescribed in sub-rule 58(6). I have no doubt that had that process been adhered to this matter would long have been finalised. There is only one issue between the parties: who is the owner of the vehicle? It could have been resolved fairly quickly if the parties had complied with the provisions of sub-rule 58(6). They simply had to approach the Deputy-Judge President to have the matter placed before a court and let the rest follow.

Order

[31] The following order is made:

a. The application to rescind the writ or to have it set aside is dismissed.

b. The parties are to jointly approach the Deputy-Judge President with a request that the matter be dealt with in accordance with the provisions of sub-rule 58(6) of the Uniform Rules of Court.

c. The first claimant is to pay the costs of this application.

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Vally J
Gauteng High Court, Johannesburg

Date of hearing:	14 February 2024
Date of judgment:	27 March 2024
For the first claimant:	Y Alli
Instructed by:	Erasmus Motaung Inc
For the second claimant:	A M van Niekerk
Instructed by:	Padayachee Attorneys