

SOUTH AFRICA / JUDGMENT

B.B v L.B and Others (15788/2024)

[2024] ZAWCHC 359 (11 November 2024)

[2024] ZAWCHC 359**COURT**

Western Cape High Court, Cape Town

BEFORE

Van Den Berg AJ

CASE / FILE NUMBER

15788/2024

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****WESTERN****CAPE DIVISION, CAPE TOWN****CASE****NO: 15788/2024****In**

the matter between:

B[...]
C[...] B[...]
APPELLANT
(FORMERLY
M[...])
And
L[...]
L[...]
B[...]
FIRST RESPONDENT
JURGENS
JOHANNES TUBB
SECOND RESPONDENT
RIËTTE
SMUTS

THIRD RESPONDENT

Hearing

date:

25 October 2024

Date

of judgment: The judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for hand down is deemed to be 11 November 2024

JUDGMENT

ORDER GRANTED

- [1] The application is dismissed.
- [2] The applicant is ordered to pay the costs of the application, including the costs of counsel on Scale C in terms of Uniform Rule 69A and all costs, charges and expenses reasonably incurred, including the costs of preparing the explanatory affidavits of the second and third respondents as per Uniform Rule 70(3).

A. PARTIES, RELIEF AND DISPUTES

- [3] The applicant, Ms B[...] C[...] B[...], was married on 7 October 2023 to the first respondent, Mr L[...] L[...] B[...]. The second respondent is a practising attorney and mutual friend of many years

of both the applicant and the first respondent. The enduring and close friendship between the applicant and the first and second respondents is best illustrated by the fact that the second respondent acted as the master of ceremonies at the wedding of the applicant and the first respondent.

- [4] The third respondent is a practising attorney, conveyancer, and notary who practises with the second respondent at MHI Attorneys. The third respondent was responsible for drafting, signing, and registering an antenuptial contract for the applicant and the first respondent, which was apparently signed on 4 October 2023.

- [5] The applicant applies in her Notice of Motion for the following relief:

[5.1] The document annexed to the Notice of Motion marked annexure "NoM1", which purport to be a signed executed and registered antenuptial Contract ("the ANC") be set aside as invalid and unenforceable.

[5.2] The marriage entered into between the applicant and the first respondent be declared to be one in community of property.

[5.3] Ancillary relief, including costs.

[6] The extensive 399 pages of affidavit and annexures detail a series of claims and counterclaims, clearly illustrating the profound and deep-seated distrust and hostility between the applicant and the

first respondent.

[7] In essence, the applicant denies ever discussing or reaching an agreement with the first respondent regarding the marital regime prior to their wedding and has consented to enter into an antenuptial contract with the first respondent.

[8] The applicant seeks no relief against the second and third respondents, who were joined to the application as they have an interest therein. The second and third respondents did not file answering affidavits, rather, they provided the Court with detailed explanatory affidavits. The first respondent opposed the application and sought its dismissal along with a punitive cost order.

B. THE EVENTS OF 3 AND 4 OCTOBER 2023

[9] The first respondent, who is 90 years of age, and the applicant, who is 60, have known each other since the applicant was a child. The first respondent was a friend of the applicant's

late father. During or about 2017, the applicant and the first respondent became romantically involved in an intimate relationship.

The applicant asserts that the first respondent expressed his love for her and desired to marry before reaching his 90th birthday.

[10] It was decided that the couple would marry on 7 October 2023. The applicant alleges that that throughout the conversations between the first respondent and her regarding their planned marriage and the organisation of the wedding ceremony, they did not address the patrimonial matters concerning their intended marriage. The applicant intended to be married in community of property.

[11] The applicant has known the second respondent for approximately 20 years and has trusted him as her attorney and legal advisor for the past 10 years. She trusted and relied upon the second respondent and accepted that he would conduct himself appropriately and professionally, and demonstrate the necessary skill, integrity, and act in her best interest.

[12] The applicant alleges that on 3 October 2023, the second respondent telephoned her and requested that she visit his office briefly on the morning of 4 October 2024 to sign a document that, the applicant alleges, the second respondent described as "insignificant", although it was related to the wedding.

[13] On 4 October 2023, the applicant attended the office of the second respondent. The applicant and the second respondent were alone in his office, and the applicant alleges that the second respondent briefly displayed a document to her, which she managed to catch a mere glimpse of for the moment. She could not determine what it was and did not see its contents. The

second respondent failed to provide any details about the document or its contents. The applicant explains that due to her complete trust in the second respondent, she asked no questions and simply signed the document where indicated.

- [14] As will be described hereunder, it is common cause that the third respondent attended the first respondent's residence on 4 October 2023, shortly after noon, where the first respondent and two witnesses signed the ANC and other documents. It is further common cause that the applicant at least saw and spoke with the third respondent at the residence. However, she denies that she signed any documents in the presence of the first and third respondents, as well as the two witnesses at the first respondent's residence. The third respondent states in her explanatory affidavit that the applicant and first respondent executed the ANC in duplicate along with additional documents in the presence of the witnesses.
- [15] In early May 2024, the applicant, by chance, overheard a discussion between two strangers in a coffee shop regarding antenuptial contracts and the requirements for signing such a contract before the date of the wedding. According to the applicant, this triggered her suspicion regarding the document, which she alleges the second respondent prompted her to sign.
- [16] Despite the many years of friendship between the applicant and the first and second respondents, she chose not to confront either of them or inquire about the questionable document she had signed on 4 October 2023. The applicant phoned the office of the second respondent and requested a copy of the document. On 3

May 2024, she obtained what purported to be a copy of the document and discovered, to her dismay and surprise, that it was the ANC, a copy of which is annexed to the Notice of Motion.

- [17] The applicant sought legal advice from her current attorney of record regarding the matter, who then directed correspondence to the second respondent, enquiring about the circumstances surrounding the registration of the ANC. The applicant's attorney stated the following in their letter dated 9 May 2024:

"It is our instruction that our client has reservations and concerns of what she signed to when signing the antenuptial contract hereinafter referred to as the ANC, with yourself on the morning of 4 October 2023 at your office."

- [18] The third respondent replied to the applicant's attorney's request on behalf of the second respondent on 9 May 2024 per email as follows:

"... Kindly be advised that he (referring to the second respondent), requested me to reply, as I am the notary responsible for the execution of the Antenuptial Contract in question."

On 3 October Mr & Mrs B[...] attended our office and Mr Tubb explained the various matrimonial systems available in South Africa and the patrimonial consequences of each. As he is not a Notary Public, I again explained same to them (this is standard practice as I am the Notary taking the responsibility), and they elected to get married out of community of property without the accrual system. I drafted the document and attended to signature the next day.

I assume you received a copy of same from your client. Kindly be advised that I personally attended to signature of the Antenuptial Contract at Mr B[...]’s residence in Joostenbergvlakte on 4 October 2023. Myself, Mr & Mrs B [...], together with the two witnesses were personally present during signature. I prefer not to sign Antenuptial Contract under Power of Attorney as it is important to me that clients understand what they are signing. Before signature I again recapped that they would be getting married out of community of property without accrual and they confirmed that they were in agreement.

Do not hesitate to contact me with any further questions herein.”

[19] On 13 May 2024, the applicant’s attorney directed a further letter to the second and third respondents enquiring inter alia about the names of the witnesses who witnessed the parties signing the antenuptial contract and when they met at the office of the second respondent.

[20] On 14 May 2024 the third respondent again replied to the query by the applicant’s attorney as follows:

“... Kindly be advised that Mr & Mrs B[...] were at our offices on 3 and 4 October respectively for consultation with Mr Tubb. Mr B[...] on 3 October at 08h30 and Ms B[...] on 4 October at 08h00.

One of the witnesses was a friend of Ms B[...] who was at Mr B[...]’s residence the day of signature. She helped with the wedding and a lady I assumed worked for either Mr or Mrs B [...], was helping to get the cutlery ready for the wedding. I do not have their names or contact information of them, but I am sure Ms B[...] will be able to provide same as she knew them.”

[21] With this information in hand, the applicant, with the assistance and advise of her legal representative, launched motion proceedings. The applicant interprets the third respondent's written replies as mutually contradictory, and she contends that she could not foresee any factual dispute regarding the events that transpired on 3 and 4 October 2023. However, the applicant’s version and the third respondent’s account of how the ANC was signed are diametrically opposed. The applicant’s founding affidavit makes serious allegations of fraud, deceit, and unscrupulous conduct by the respondents. I have difficulty understanding how the applicant and her legal representatives could have thought these allegations would remain uncontested.

[22] However, the applicant obtained the confirmatory affidavits from the two witnesses who signed the documents at the first respondent's residence, allegedly in the presence of only the first and third respondent. According to the applicant, both witnesses deny that she signed the documents in their presence. Unfortunately, both witnesses filed only a confirmatory affidavit, which contained no substantiated allegations but merely confirmed the applicant's

version by reference.

[23] The first respondent refutes the value of the witnesses' confirmatory affidavits, arguing that both witnesses have a connection to the applicant, one being a friend and the other an employee.

[24] This, in itself, does not advance the matter but emphasises the undeniable existence of unresolvable factual disputes on the papers before the Court.

C. THE FIRST RESPONDENT'S VERSION AND EXPLANATION OFFERED BY THE SECOND AND THIRD RESPONDENTS

[25] It is evident from the papers filed of record that there are numerous and wide-ranging unresolved disputes of fact between the parties. The disputes relate to virtually every element and aspect of the cause of action, based on accusations of fraud and deceitful dealings involving officers of this Court, with whom the applicant enjoyed a longstanding attorney and client relationship.

[26] The respondents opposed the relief claimed and the applicant's version on a conspectus of their evidence on the following basis:

[26.1.] The applicant authored numerous WhatsApp messages and engaged in discussions prior to the wedding date concerning the conclusion of an antenuptial contract.

[26.2.] That the applicant clearly indicated that she understood the import of the conclusion of an ANC while also expressing that she possessed her own resources and that she did not want the first respondent's financial support.

[26.3.] That according to the third respondent, on 4 October 2023 the applicant appended her signature on an array of documents which included amongst others an indemnity form, a consent in terms of the POPI Act, a personal affidavit, and a duplicate antenuptial contract.

[26.4.] That the second respondent waived his fees of his attorney's firm for drafting the ANC, considering it to be a wedding gift to the couple. On 17 October 2023, the Applicant personally expressed her gratitude to the third respondent in an email for the "wedding present" following receipt of an email from the third respondent that confirmed the registration of the antenuptial contract and an account clearly reflecting fees in respect of the drafting and finalisation thereof.

[26.5.] That the applicant, on 18 October 2023, in a WhatsApp message expressed gratitude to the second respondent for the wedding present (referring to the ANC) and pointed out in Afrikaans (translated into English) “the new weddings affairs were rather different from those of the first one”.

[26.6.] On 17 April 2024 the applicant signed a Will wherein it was clearly recorded that she was married out of community of property.

D. DISPUTES OF FACT

[27] It is settled that motion proceedings, unless concerned with interim relief, focus on addressing legal issues based on common cause facts. Affidavits cannot be used to resolve factual issues unless the circumstances are exceptional, as they are not intended to ascertain probabilities. It is well established under the Plascon-Evan Rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can only be granted if the facts averred in the applicant’s affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify such order.[1]

[28] If the respondent’s version is lacking credibility, uncreditworthy or raises fictitious disputes of fact, or is palpably implausible, farfetched or so clearly untenable that the Court is justified in rejecting it solely based on the papers, the situation may be different, entitling the applicant to succeed. Whether a factual dispute exists is not a matter of discretion. It is a question of fact and a jurisdictional pre-requisite for the exercise of the Court’s discretion. In terms of Rule 6(5)(g) the Court may dismiss the application or make such an order as it deems fit with a view to ensuring a just and expeditious decision by directing inter alia that oral evidence be heard on specific issues, or referring the matter to trial with appropriate directions as to the pleadings or definition of issues.

[29] The Court will dismiss an application if the applicant should have realised in launching the application that a dispute of fact incapable of resolution on the papers was bound to develop.

[30] In *Gounder v Top Spec Investments (Pty) Ltd*[2] the Supreme Court of Appeal held regarding a dispute between a husband and a wife concerning the signing of documents as follows:

“[10] Much as it is preferable that claims like the present one should be instituted by way of an action, a claimant is not barred from instituting a claim by way of notice of motion. The latter proceeding is pursued at a claimant’s own peril should a factual dispute arise which turns out to be incapable of being resolved on the papers; the risk being a dismissal of the application should the court, in the exercise of its discretion, decide not to refer the matter for trial, nor direct that oral evidence be placed before it. In the present matter, however, it seems to me that the only possible dispute of fact was the question whether or not the appellant (respondent in the Court a quo) signed the written document and the Power of Attorney to register a mortgage bond. These being motion proceedings, it must be accepted that the

appellant did not sign the documents and the matter must be decided on that basis.”

[31] The applicant initially invited me to adopt a robust approach. Given the factual disputes, the Court could have adopted the same approach as in the Gounder matter by accepting the first respondent's version and dismissing the application.

[32] The present matter is distinguished from instances where relief is usually sought by motion, such as review applications, in terms of Rule 53.[3] To the contrary, relief of this nature based upon allegations of misrepresentation or fraud is usually sought by way of action proceedings and trial.

[33] The applicant is dominus litis and should decide whether she wishes the Court to exercise its discretion by referring the matter for testimony or trial. It does not suffice to leave the decision in the hands of the Court to refer the matter for hearing of evidence should it be deemed

necessary or as submitted in the applicant's heads of argument "... should it find that the matter cannot be resolved on papers as they stand, that it be referred to oral evidence as per the order in Metallurgical and Commercial Consultants Co (Pty) Ltd v Metal Sales Co (Pty) Ltd." [4]

[34] The judgment in the Metallurgical and Commercial Consultants matter is distinguishable from the facts before me. In that matter the Court held that the probabilities are against the respondent on the issue and accordingly held that it would not be just to deny the respondent the benefit of an oral hearing which the respondent sought.

[35] The Supreme Court of Appeal in Pahad Shipping CC v Commissioner for the South African Revenue services [5] at para [20] as follows:

"However, it has been held in a number of cases that an application to refer a matter to evidence should be made at the outset and not after argument on the merits (See Kalil v Decotex (Pty) Ltd and another 1988 (1) SA 943 (A) at 981D to F). As was stated by Corbett JA in Kalil at 981E to F the rule is a salutary general rule. Unnecessary costs and delay can be avoided by following the general rule. But Corbett JA also stated that the rule is not inflexible. In Du Plessis and another NNO v Rolfes Limited [1996] ZASCA 45; 1997 (2) SA 354 (A) at 366G to 367A the Court dealt with an application which was made for the first time during argument in this Court. The application was dismissed but it is implicit in the judgment that, in appropriate circumstances, the Court may decide that a matter should be referred to evidence even where no application for such referral had been made in the Court below. It would naturally be in exceptional cases only that a Court will depart from the general rule."

[36] The learned authors of the standard work Erasmus: Superior Court Practice state in their commentary to Rule 6(5)(g) as follows:

"In exercising its discretion under the subrule, the Court will to a large extent be guided by the prospects of viva voce evidence tipping the balance in favour of the applicant. If on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. The more the scales are depressed against the applicant, the less likely the Court will be to exercise its discretion in favour of the applicant. Only in rare cases will the Court order the hearing of oral evidence where the preponderance of probability on

the affidavits favour the respondent.”[6]

[37] I invited Mr Mooij, who appeared on behalf of the applicant, to indicate if the applicant applies for the referral of the matter to trial or oral evidence. This enquiry by the Court was after Mr Mooij argued in earnest the merits of the matter despite the clear existence of the factual disputes described aforesaid. Mr Mooij was further invited to provide the Court with a draft Court order. The order provided by the applicant’s Counsel was in line with the order granted in the Metallurgic and Commercial Consultants matter. However, when an order is granted in terms of Rule 6(5)(g) of the Uniform Rules of Court referring the matter for the hearing of oral evidence, the order should not be formulated in such a manner as if it were on trial. It is more desirable and in the interest of certainty and justice that the order specifies which

issues

will be determined by the hearing of oral evidence and define who may or must be called as witnesses.[7]

[38] In argument on behalf of the first respondent Mr La Grange SC relied upon the judgment by Willis JA (as he was then) in *Langeveld v Union Finance Holdings (Pty) Ltd* [8] where the Court held regarding the disputed conclusion of a suretyship as follows:

“The appellant is no “babe-in-the-woods”, never mind an illiterate. She is an accomplished businesswoman of many years’

standing. There is a strong praesumptio hominis (popular presumption or presumption common among persons) that anyone who has signed a document, had the animus (intention) to enter into the transaction contained in it and she is burdened with the onus of convincing the Court that she in fact had not entered into the transaction by virtue of the maxim caveat subscriptor (a person who signs must be careful). As A.J. Kerr says: “It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.”

[39] I can therefore not accept the submission on behalf of the applicant that the onus rests upon the first respondent to prove the conclusion and validity of the ANC and that this could justify the institution of these proceedings by way of motion.

[40] The court has the discretion to dismiss the application or make such an order that it considers appropriate to ensure a fair and timely decision in the event that there are unresolvable factual disputes on the papers.

[41] I enquired with Counsel whether the applicant and first respondent intended to continue their marriage, given the first respondent's advanced age, the acute nature of the allegations, and the apparent impact on their relationship. I was informed from the Bar that the first respondent had, in the week preceding the argument, instituted divorce proceedings against the applicant. However, Mr Mooij indicated that the applicant does not believe that the

marriage has broken down irretrievably despite the seriousness of what she alleges to have occurred. The parties will inevitably need to resolve their disputes at trial.

- [42] The scope of the disagreements is extensive, and it would not be in the interest of justice or practical to hear evidence on only the principle disputed. Therefore, the disputes regarding the validity of the ANC can be best articulated and ventilated after the exchange of pleadings, discovery and at a trial.
- [43] Without making any finding regarding the merits or correctness of any of the applicants or the respondents' allegations and counter-allegations, in exercising my discretion, I am, however, of the view that the scales regarding probability are skewed in favour of the respondents. The application would be dismissed on the merits should the applicant not have applied at the eleventh hour for the referral to oral testimony. This important aspect fortifies my finding that I should not exercise my discretion in favour of the applicant to refer the matter for evidence or trial.
- [44] I am not inclined to accept the invitation by Mr Mooij on behalf of the applicant to refer the matter to oral evidence and for me to hear such evidence. There are no clearly defined disputes, and I accept that evidence would need to be presented not only on one single aspect but on the main issues and surrounding circumstances that gave rise to this registration of the ANC. Both the applicant and the first respondent have vested financial interest, and any decision regarding their matrimonial regime will have far-reaching implications.
- [45] Given the materiality of the factual disputes which are incapable of being resolved on the papers and the fact that the disputed facts were forceable considering the serious allegations levied against the second and third respondents, as well as the correspondence exchanged between the parties' legal representatives prior to the launching of the application, I am satisfied that the only appropriate order is to dismiss the application. I make no finding regarding the merits of any of the parties' contentions and the applicant is free to take whatever action she may be advised to adopt.
- [46] Considering the aforesaid I am satisfied that a cost order in respect of Counsel's fees on Scale C in terms of Rule 69A is justified. However, I do not believe the applicant should be milked with a punitive cost order, especially in light of the pending divorce proceedings. This does not mean that the first respondent should be out of pocket, and I will rule that the applicant should pay in terms of Uniform Rule 70(3) all costs, charges and expenses reasonably incurred, including the costs of the explanatory affidavits of the second and third respondents. Both the applicant and first respondent referred to the explanatory affidavits of the second and third respondents, and it formed an integral part of the proceedings. Although the second and third respondents filed a notice to abide, the allegations of professional misconduct against the second and third respondents could not be left unanswered. They had no choice but to file the explanatory affidavits. The applicant joined the second and third respondents as parties to the application, and it was reasonably

foreseeable that all the respondents would incur costs.

[47] In the result, I grant the following order:

[1] The application is dismissed.

[2] The applicant is ordered to pay the costs of the application, including the costs of counsel on Scale C in terms of Uniform Rule 69A and all costs, charges and expenses reasonably incurred, including the costs of the explanatory affidavits of the second and third respondents and the preparations of the heads of argument as per Uniform Rule 70(3).

VAN DEN BERG AJ

FOR THE APPLICANT

ADV A MOOIJ

MIKE STRYDOM ATTORNEYS

REF RM/SJ/RL210-6

FOR THE FIRST RESPONDENT A DE V LA GRANGE SC

DE KLERK AND VAN GEND ATTORNEYS

REF RV/os/MAT11057

[1] Plascon-Evans Paints Limited v Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634

[2]

[2008] ZASCA 52; 2008 (5) SA 151 (SCA) at 153H to 154D

[3] Mamadi v Premier, Limpopo and others 2024 (1) SA 1 (CC)

[4] South African Veterinary Council and another v Szymanski 2003 (4) SA 42 (SCA) at para 31

[5] [2020] 2 ALL SA 246 (SCA) also reported at 2009 JDR 1322 (SCA)

[6] Hansa Silver (Pty) Ltd v Obifon (Pty) Ltd t/a The High Street Auction Co 2015 (4) SA 17 (SCA) at 26D to F

[7] Standard Bank of SA Limited v Neugarten and others 1987 (3) SA 695 (BLBR) 699A to I

[8] 2007 (4) SA 572 (WLD) at para 12

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