

SOUTH AFRICA / JUDGMENT

De Filippo v Micillo (Reasons) (11709/2017) [2024] ZAWCHC 289 (23 September 2024) [2024] ZAWCHC 289

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

11709/2017

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In the High Court of South Africa

(Western Cape Division, Cape Town)

Case no.: 11709/2017

In the matter between:

MANFREDI DE FILIPPO

(substituted for GIANCARLO DE FILIPPO)

Plaintiff

and

ALESSANDRA MICILLO

Defendant

REASONS DELIVERED ON 23 SEPTEMBER 2024

Delivered electronically via email

VAN ZYL AJ:

Introduction

1. This action involves a dispute about the ownership of two immovable properties in Cape Town. The plaintiff has been substituted^[1] for the erstwhile plaintiff, Mr Giancarlo de Filippo (his father,^[2] referred to as “Giancarlo”), who passed away on 9 August 2018.
2. On 2 September 2024 I granted an order in the following terms:
 1. The defendant shall pay to the plaintiff the amount of R12 181 781,48.
 2. The defendant shall pay interest on the aforesaid sum at the legally prescribed rate, a tempore morae.
 3. The defendant is directed to do all things necessary to enable the plaintiff to sell the immovable property situated at 1[...] K[...] C[...] Road, Constantia, Cape Town.
 4. The Sheriff of the High Court is authorized and directed to comply on the defendant’s behalf with the order in paragraph 3 above, in the event of the defendant failing to do so.
 5. The plaintiff is released from having to provide security for the defendant’s costs and, to the extent necessary, Webber Wentzel Attorneys are released from the bond of security in the defendant’s favour dated 8 December 2017
 6. The entire amount of the proceeds of the sale of the immovable property situated at [...] B[...] Avenue, Constantia, Cape Town, currently held in the trust account of Bowman Gilfillan Inc., are to be paid forthwith into the trust account of Webber Wentzel Attorneys.
 7. The defendant shall pay the plaintiff’s costs of suit on the scale as between attorney and client.
3. The order was granted after hearing the plaintiff’s evidence-in-chief on 31 July 2024 and in the absence of the defendant, who was in default of appearance at the resumption of the trial on 2 September 2024.
4. Seven affidavits deposed to by Giancarlo over the years leading up to the hearing of the action for purposes of inter alia an anti-dissipation application, the defendant’s rescission and variation applications, as well as two contempt applications, were admitted as evidence for the purposes of the trial.^[3]
5. These are the reasons for the grant of the order. In what follows, I shall discuss the merits of the action first, and thereafter deal with the circumstances surrounding the defendant’s default.

Background

6. Giancarlo and the defendant, both Italian citizens, had a romantic relationship. They lived together from February 2009 to November

2014, when Giancarlo terminated the relationship.

7. While the parties were still together, two immovable properties were purchased in Cape Town, namely 1[...] C[...] Road, Constantia (“K[...] C[...]”) and [...] B[...] Avenue, Contantia (“B[...]”). It is common cause that the purchase of both properties was funded Giancarlo, and acquired in the defendant’s name. I shall return to the reasons for this arrangement.
8. B[...] was sold after the termination of the parties’ relationship. The defendant retained the proceeds of the sale. She also continued to reside at K[...] C[...] with Giancarlo’s consent. She is still residing there.[4]
9. The plaintiff alleges the existence of an oral agreement between the parties to the effect that Giancarlo had agreed to fund the purchase of the properties to be registered in the defendant’s name, on condition that they would eventually be sold and the proceeds paid to Giancarlo. The plaintiff thus seeks an order that the proceeds of the B[...] property be paid to him, and that the K[...] C[...] property be sold and the proceeds paid to the plaintiff.
10. The defendant denies the existence of the oral agreement. She contends that the properties were donated to her.
11. On 25 April 2017 Giancarlo obtained an order[5] (“the anti-dissipation order”) interdicting the defendant from alienating K[...] C[...], and from disposing of the proceeds from the sale of B[...], pending the outcome of the action. This was because the defendant was residing in K[...] C[...], and had retained the proceeds of the B[...] sale in her own bank accounts. The Court (the Honourable Justice Baartman presiding) inter alia interdicted the defendant from:
 - 11.1 directly or indirectly dealing in any way with, disposing of or removing from the Republic of South Africa any of the funds, including present or future funds, held in any one or more of various enumerated bank accounts on condition that a monthly amount of R34 000-00[6] could be drawn from one such account to provide for her living expenses;
 - 11.2 selling, alienating, encumbering or in any way disposing of K[...] C[...], pledging, mortgaging or in any way encumbering the property, and in any way damaging, or causing or allowing damage to be caused to the property.
12. On 8 September 2017[7] the Court ordered the proceeds of the sale of the B[...] property to be held in the trust account of Bowman Gilfillan Inc, the defendant's fourth set of attorneys at the time, pending the finalisation of the action.
13. Various interlocutory skirmishes followed[8] before the matter was declared trial ready during November 2023 and set down for hearing on 12 March 2024. I shall return to the events leading up to 12 March 2024 and thereafter, which culminated in the order of 2 September 2024 being granted in the absence of the defendant.

The claim, and the defence

14. The pleadings and the evidence on record indicate the following:

The acquisition of the immovable properties

15. During 2013[9] Giancarlo and the defendant entered into an oral agreement (“the first agreement”) with the following material terms:

15.1 Giancarlo would buy a house in Cape Town, preferably in Constantia, to be registered in the defendant’s name.

15.2 The property would be paid for by Giancarlo, and although it would be acquired in the defendant’s name, it would not be a gift or a donation.

15.3 The parties would enjoy the use of the property during the South African summer season for a few years, whereafter it would be sold and the proceeds of the sale “repatriated” to Giancarlo’s bank account in Europe where the money to finance the purchase originated from.

15.4 It was a tacit term of the first agreement that, in the event of the termination of the parties’ relationship, the property would be sold and the proceeds paid to Giancarlo’s bank account in Europe where the funds to finance the purchase originated from.

16. On 22 June 2013, pursuant to the first agreement, the defendant entered into an agreement for the purchase of the B[...] property, at a purchase price of R11,5 million. Giancarlo discharged his obligation under the first agreement by transferring sufficient funds from his bank account in Europe to pay the purchase price.

17. Following registration of B[...] into the defendant’s name on 2 December 2013, Giancarlo decided to sell B[...] because renovating it would take too long, and be too costly.

18. Between 2 December 2013 and 9 March 2014, the parties entered into a further oral agreement (“the second agreement”) with the same material terms as the first agreement. It was also a tacit term of the second agreement that in the event of the termination of the parties’ relationship the new property would be sold and the proceeds paid to Giancarlo’s bank account in Europe.

19. On 10 March 2014, pursuant to the second agreement, the defendant concluded an agreement for the purchase of the K[...] C[...] property, at a purchase price of R14 million. Giancarlo discharged his obligation under the second agreement by transferring sufficient funds from his overseas bank account to pay the purchase price, and K[...] C[...] was registered in the defendant’s name on 6 May 2014.

20. Two considerations led to Giancarlo’s decision to purchase immovable property in South Africa:[10] The first consideration was that the defendant had previously lived in South Africa for about five years before the commencement of the parties’ relationship, and frequently expressed the wish to return to South Africa, if even for a few months a year during the European winter season. This was an agreeable proposition to Giancarlo who started to investigate the real estate market in Cape Town and, in particular, in Constantia.

21. The second consideration was that, towards the end of 2010, the Italian Commission of Control of the Italian Stock Exchange (“CONSOB”)

started investigating Giancarlo’s financial affairs for possible insider trading and buying and selling activities in respect

of a listed Italian company. This was followed in 2011 by a formal charge by the prosecuting authority in Milan. To protect his assets, or at least some of them, against possible judicial sequestration,[11] he decided to buy property in South Africa, the purchase of which he would finance, but to register it in the defendant’s name.

22. B[...] was sold for a purchase price of R12,6 million on 20 July 2015.

23. As of 27 July 2015, the amount expended by Giancarlo in respect of various contracts for the renovation of K[...] C[...] amounted to R5 457 829,13.[12]

The dispute between the parties

24. It is common cause that the defendant caused the net proceeds of the B[...] sale in an amount of R12 181 781,48 to be paid to herself into two bank accounts, namely R1 million thereof into her Société Générale account number 0 [...], and the balance into her First National Bank account number 6 [...].

25. The plaintiff alleges that the retention of the proceeds was in breach of the provisions of the first agreement. As a result of the defendant’s breach of contract, Giancarlo suffered damages in an amount of R12 181 781,48, and the plaintiff claims payment of that amount, plus interest.

26. In breach of the second agreement, the defendant continues to occupy K[...] C[...] and claims it to be hers to do with as she pleases, whereas the plaintiff alleges that the property should be sold and the proceeds paid over to him. The plaintiff therefore claims an order mandating him to appoint an estate agent to market and sell the property, obliging the defendant to sign all documents necessary to transfer the property to a future buyer, and to give instructions for the purchase consideration to be paid into a bank account designated by him. Should she fail to do so, the Sheriff of the High Court should be directed to comply with the order on the defendant’s behalf.

27. Giancarlo made many attempts to resolve the outstanding matters between him and the defendant prior to his death. He made various settlement proposals in relation to the properties, all more than €2 million in value, the most favourable of which was of the order of €2,4 million in value. None of the proposals was acceptable to the defendant.

28. The defendant denies that the purchases were made pursuant to any agreement between her and Giancarlo. She avers that she became the lawful owner of the properties, and that the transfers made by Giancarlo from his bank account in Europe were donations to her. That being the case, she was entitled to the proceeds of the sale of B[...]; and she is the lawful owner of K[...] C[...] and has no obligation to sell the property.
29. The defendant avers further that it was a joint decision to sell B[...]. Giancarlo, in consultation with her, had given instructions for B[...] to be put up for sale, decided which estate agent would market B[...], what the asking price would be, and which offer to accept.
30. Most of this information appears from the pleadings and the affidavits admitted into the records. The current plaintiff gave oral evidence on the aspects that he was aware given his conversations with his father over the years.
31. The trial was postponed after the plaintiff's evidence-in-chief on 31 July 2024, and resumed on 2 September 2024. On that day, the defendant did not appear, and the plaintiff was not cross-examined. No further oral evidence was led on behalf of either party.

The relevant legal principles

A written contract is not essential

32. The agreements on which the plaintiff relies are not in writing.
33. In *Goldblatt v Fremantle*[13] the Court stated that: "Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity." [14]
34. One of the exceptions requiring writing for the coming into being of a valid agreement is to be found in section 2(1) of the Alienation of Land Act 68 of 1981 ("the ALA"), which provides as follows:

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28,[15] be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."
35. Section 2(1) gives rise to the question whether the agreements which the plaintiff relies upon concern alienation of land which, to be of any force or effect, requires to be contained in a deed of alienation signed by the parties thereto.
36. The answer to that question is in the negative. As the section involves an alteration of the common law, it must be interpreted strictly.[16]
37. Section 1 of the ALA defines "alienate", "in relation to land", as meaning to "sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolute condition, and 'alienation' has a corresponding meaning".

38. On Giancarlo's version, the agreements between himself and the defendant did not involve the sale, exchange, or donation of

land.[17] On the contrary, they required the defendant, in defined circumstances, to sell the land that had been purchased and registered in her name, subsequent to which she would have had to reimburse Giancarlo. The sale of the land would involve a third party, and that sale would have to comply with the provisions of section 2(1) of the ALA, as the sale of B[...] did. In fact, the current position as far as B[...] is concerned illustrates the point: The property was sold to a third party and the plaintiff now claims the proceeds in accordance with the agreement that Giancarlo and the defendant had concluded. The upshot of the agreements does not involve an ineffective sale of land but one that would see the proceeds of valid sales between the registered owner, the defendant, and a third party, which comply with section 2(1) of the ALA, being paid over to the plaintiff.

39. Dadabhay v Dadabhay and another[18] concerned a matter where the appellant had orally agreed with the first respondent that he would purchase an erf from the Community

Development Board as her "nominee". The respondent duly purchased the erf without ex facie the written agreement purporting to represent the appellant. The respondent denied concluding a contract with the appellant and

pleaded that he was entitled to ownership of the property having entered into a written agreement with the Board. The Appellate

Division concluded as follows:

"To sum up, in the present matter, on the case pleaded in the appellant's particulars of claim, there was an oral agreement that the respondent would buy an erf from the Board; that he would do so as 'nominee' (which, as I have said, may well have been intended to mean 'trustee') for the appellant; that there is no mention of monetary consideration for his service; and that, when called upon, he would sign all documents necessary to enable the erf to be registered in her name. Having regard to the authority cited above, in my view the oral agreement is not hit by s 1(1) of Act 68 of 1957; it is not a contract of sale or a cession in the nature of a sale." [19]

40. In Mossop v McLaren[20] this Court held that the plaintiff had discharged the onus of proving an oral agreement which the parties had concluded, prior to the acquisition of immovable property, in terms of which the defendant undertook to purchase and acquire the property as nominee and trustee for and on behalf of the plaintiff. In this regard the Court found that: "The Plaintiff's version that the Defendant would hold the Durbanville property as nominee and would be obliged to deliver the said property on demand is, on a conspectus of all the evidence in this case, more plausible and credible than the Defendant's version." [21]

The burden of proof

41. It is trite that the burden of proving the existence of a contract is on the party who alleges such existence, and thus the plaintiff has to show that the contracts exist and what their terms are.
42. In *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd*[22] the Appellate Division stated the law to be as follows: “Ordinarily, the general rule is that a plaintiff who sues on a contract must prove his contract, even though this may involve proving a negative, viz that an additional term alleged by the defendant was not agreed to by the parties ...”[23]
43. As indicated, the plaintiff relies on a tacit term of the agreements which would see the sale of the immovable properties in the event of the termination of the original parties’ relationship, and the repatriation of the proceeds to Giancarlo’s bank account in Europe.
44. In *Bremer Meulens (Edms) Bpk v Floros*[24] the Appellant Division stated the following: “Insofar as the essentials are concerned, there is no difference between express and tacit agreements. Indeed the only difference lies in the method of proof, the former being proved either by evidence of the verbal declarations of the parties or the production of the written instrument embodying their agreement, the latter by inference from the conduct of the parties.”
45. A tacit term of a contract, or a term implied from the facts, was described in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*[25] inter alia as “an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties.”
46. This dictum was followed in *Scholtz v Scholtz*[26] as follows:

“[12] Tacit terms, on the other hand, are by definition not to be found through interpretation of the express terms. They are by definition neither recorded nor expressly agreed upon by the parties. They often pertain to matters which the parties did not even consider. They emanate from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances (see, for example, Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration (1974 (3) SA 506 (A) at 531H).”
47. To determine whether a tacit term is to be imported into the contract, the express terms of the contract must be examined. The question to be asked is whether, regard being had to the express terms of the contract, there is any room for importing the alleged implied term.[27] When an examination of the express terms does not immediately exclude the possibility of importing a tacit term, the next question is what general tests the Court should apply to decide whether the importation of a tacit term would be appropriate. [28]
48. In *Buffalo City Metropolitan Municipality v Nurcha Development Finance (Pty) Ltd and others*[29] the Supreme Court of Appeal held as follows:

“[16] The test for establishing the intention of the parties to conclude a tacit contract is now settled. In Butters v Mncora 2012 (4) SA 1 (SCA) ..., where a universal partnership between co-habitees was relied upon, Heher JA said (para 34):

‘This appeal is about an alleged tacit agreement. As in all such cases the court searches the evidence for manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue that is the crux of the agreement and, per contram, any indication which cannot be reconciled with it. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence, that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their agreement. Despite the different formulations of the onus that exists (see the discussion in Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd [1984] ZASCA 4; 1984 (3) SA 155 (A)) ... this is the essence of the matter.’

This statement is a minority judgment but the majority did not take issue with the principle. It was only the application of the principle that was in dispute.

...

[21] In Butters, Brand JA for the majority, in deciding whether a universal partnership had been established, held that (para 18):

‘Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement has been reached.’”

The required standard of proof

49. In Govan v Skidmore[30] the Curt, having alluded to the different standards of proof variously applicable to criminal and civil matters, held that it was

“trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of

probability, even although its so doing does not exclude every reasonable doubt”, so that one may, “by balancing probabilities, select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several

conceivable ones, even though that conclusion be not the only reasonable one”.

50. It has been held[31] that “plausible” in this context means “acceptable, credible, suitable”.

51. The onus of proof must be distinguished from the evidentiary burden (“weerleggingslas”) which, itself, involves at least two discrete concepts, namely a duty to adduce evidence to combat a prima facie case made by one’s opponent; and the duty cast upon a litigant, who has to begin, of adducing evidence in order to escape certain procedural consequences. The evidentiary burden is the evidential burden of combating a prima facie case made by one’s opponent. [32]
52. The principles applicable to prima facie inferences apply to civil and criminal cases but this does not mean that in some cases a party may obtain a verdict without producing the ordinary degree of proof. The requisite standard must always be satisfied. However, in considering whether the onus has been

discharged, the Court is entitled, in appropriate cases, to take a party’s failure to adduce evidence into account.[33] In other words, in civil cases the overriding question is whether the party who bears the onus has discharged it but the absence of an explanation can be a circumstance to be taken into account in arriving at a conclusion.[34]

53. A defendant’s failure to testify justifies a verdict for the plaintiff if there is enough evidence to enable the Court to conclude that, having regard to the absence of an explanation, the plaintiff’s version is more probable than not. In *Marine & Trade Insurance Co. Ltd v Van der Schyff*[35] the Appellate Division held that the plaintiff’s evidence must be such that, should he decide to close his case, an order of absolution from the instance would not be warranted.

The nature of the evidence

54. The rule is that parties present their evidence at trials orally, but the High Court has the power to give leave for evidence in a trial to be proved by affidavit. Rule 38(2) provides that a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit, provided that where it appears to the Court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be provided, that witness’s evidence shall not be given on affidavit.
55. Pursuant to this sub-rule the Court granted leave, by agreement between the parties, that seven affidavits deposed to by Giancarlo be admitted in evidence. It was fair[36] to have done so, given Giancarlo’s death in 2018, and the circumstances to which I refer further below.
56. According to Erasmus[37] the factual allegations in the affidavits stand unchallenged and no dispute of fact in respect thereof arises if the parties agree that the deponent will not be cross-examined. In the present matter the parties knew in advance that they were agreeing to the affidavits being used in evidence without there being the possibility of cross-examination of Giancarlo.

57. The Courts are reluctant to allow evidence in action proceedings to be tendered on affidavit when a deponent will not be available for cross-examination, as this may prejudice the other party. However, in *Robinson v Randfontein Estates Goldmining Co Ltd*[38] the Court remarked that the prejudice is not necessarily one-sided:

“The person who produces on paper the evidence of a witness is, as a rule, at a disadvantage, because the Court will pay more attention to the evidence of witnesses who appear before it, who are examined and cross-examined before it, than to those witnesses whom it has not had an opportunity of seeing, and if a question arises as to the credibility of such a witness, or whether the Court ought to accept his testimony, it would prefer to base its judgment on what it has seen and heard than on testimony about which some doubt may exist.”

58. In the present matter there is less reason to be concerned about the fact that the Court must decide the matter also with reference to the evidence on affidavits deposed to by a person who cannot be cross-examined, because those affidavits were not deposed to for purposes of the trial. The defendant had occasion to respond to all of them. The current plaintiff has, moreover, given viva voce evidence corroborating Giancarlo’s evidence on affidavit, and was available for cross-examination by the defendant. The defendant

chose not to do so by failing to appear on the date of the resumption of the trial on 2 September 2024.

59. Part VI of the Civil Proceedings Evidence Act 25 of 1965 contains various provisions regarding documentary evidence. Section 34 deals with the admissibility of documentary evidence as to the facts in issue. The approach in section 35(1), which deals with the weight to be attached to evidence admissible under Part VI, assists this Court in the evaluation of Giancarlo’s evidence on affidavit. It reads as follows:

“In estimating the weight, if any, to be attached to a statement admissible as evidence under this Part, regard shall be had to all

the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the person who made the statement had any incentive to conceal or misrepresent the facts.”

60. In the application proceedings prior to the commencement of the trial in which the affidavits featured over a number of years, this Court had no reason to doubt Giancarlo’s credibility.
61. I have mentioned earlier that it was fair, in the circumstances, to have the affidavits admitted as evidence. This is because delays on the defendant’s side in agreeing to a hearing date prior to Giancarlo’s death were in some part to blame for the eventual non-availability of his oral evidence.

62. It appears from the application to admit the affidavits in evidence that in some of his affidavits Giancarlo mentioned the fact that his health was seriously impaired.[39] On 13 September 2017 his attorneys wrote a letter to the defendant's attorneys at the time, in which they referred to the ongoing issues with his health: "In fact, we intend to approach you in due course as to the possibility to expedite the trial and/or hearing of the matter, which would be in both parties' interest, and kindly request that you also advise whether your client would be amenable to such an approach and/or arrangement."
63. On 14 September 2017 the defendant's attorneys responded as follows: "Our client is agreeable to the expedited hearing suggested by you." That letter was written by an attorney who subsequently left the firm, and another attorney from the same firm took over.
64. The parties became engaged in an application[40] for the variation of the anti-dissipation order, in which judgment[41] was given in May
2018. On 10 July 2018 Giancarlo's attorneys again wrote the defendant's attorneys, stating:
- "4. As you are aware, and as is common cause, our client has been suffering ongoing issues with his health, being our initial reason for suggesting an expedited trial.*
5. Further to the above our client's health condition has deteriorated over time and we are now in the precarious position of our client's health having deteriorated to such an extent that it is becoming increasingly difficult for him to travel. Moreover, our client has commenced a new form of treatment which will require him to be in Monaco between the months of July and September.
6. As you are aware, the time period for obtaining a trial date in the ordinary course is more than a year, which would result in prejudice to our client for obvious reasons, and would also not be in the best
- interest of your client. Our client is therefore desirous of dealing with this matter in the shortest time period possible.
7. In the circumstances, and having regard to the in principle agreement referred to in 2 and 3 above to expedite the trial we kindly request that you provide us with your formal written consent, so as to enable
- us to approach the Judge President to obtain an expedited trial date. In this regard, we intend to deliver a letter to the Judge President, a copy of which is annexed hereto marked 'C', proposing that the trial be set down on a date between 15 and 22 November 2018.
8. Having regard to the fact that the pleadings have closed, and discovery has been completed, we submit that the abovementioned dates allow more than sufficient time for any further trial preparation."

65. Giancarlo saw this letter before it was sent and noted that although it was difficult for him to give realistic periods due to his health problems, he was able to say that tentatively the second half of November 2018 would be a good time for setting down the trial.
66. On 26 July 2018 Giancarlo's attorneys received a call from the defendant's attorney, during which the latter advised that he would be involved in trial proceedings from 19 November 2018 for a few days, and that he would try and clarify the exact dates and revert. This never happened.
67. Instead, in a letter that was dated 13 July 2018, the defendant's previous attorney indicated that he now represented the defendant again and that, although she was aware of Giancarlo's ill health, exact details of his current state of health were unknown to her. He asked to be provided with documentary proof regarding the state of Giancarlo's health, stating that a certificate emanating from the institution providing treatment would carry more weight than a letter from his doctor.[42]
68. In his view the matter was not trial ready. The defendant intended amending her plea by the introduction of two further alternative defences, and might call for further documents. He also suggested that, before applying for an expedited date, Giancarlo's attorneys should call a Rule 37 conference to agree on a timetable dealing with the various issues.
69. By letter dated 1 August 2018 Giancarlo's attorneys reminded the defendant's attorney that the defendant had previously been agreeable to an expedited hearing, and asked whether that was still the case. The defendant's responded on 10 August 2018, the day after Giancarlo passed away, and although his letter indicated that the defendant remained agreeable to an expedited date, this would only be the case provided that the matter was ready and her witnesses available, a statement followed by a repetition of the unidentified "intention to amend and to obtain further and better discovery".
70. The strategy seems to have been to delay the matter in view of Giancarlo's illness, presumably because it was assumed that he and the defendant were the only persons with first-hand knowledge of the agreement between them regarding the two South African properties. This is particularly evidenced by the contents of paragraph 3 of the letter which reads as follows: "It is also important to Ms Micillo that any date chosen will allow for the matter to run its course in one sitting. She would be unwilling to agree to any date where there would be a danger of the matter becoming part-heard over the Christmas break." This signified that there would have been resistance to, for example, a proposal that Giancarlo's testimony be given on an expedited basis and for the remainder of the evidence to be given at a later stage.

71. As it turned out Giancarlo was found by his son to be extremely dehydrated and malnourished and in need of immediate hospitalisation during the week of 30 July to 3 August 2018 and, following his admission to the hospital Centre Princesse Grace de Monaco on 3 August 2018, he died on 9 August 2018. The defendant's attorney was informed of Giancarlo's death by letter dated 15

August 2018.

72. It appears from a medical certificate on record that, following his hospitalisation, Giancarlo would not have been able to give evidence before a commissioner nor by way of video link, and that he was so weakened that it would also not have been possible for him to depose to another affidavit.
73. In all of these circumstances, the best evidence of Giancarlo's version has become his affidavits.

The evidence on behalf of the plaintiff

74. Against the backdrop of the relevant legal principles I now turn to the available evidence.

The purchase of the properties

75. I have referred to the fact that the defendant and Giancarlo lived together from 15 February 2009 until 19 November 2014 when their relationship came to an end. Since the defendant was significantly younger than Giancarlo, she was concerned for her financial security in the event of his death and, to allay her fears, he established a real estate company in Monaco on 2 July 2009 which purchased an apartment in a French village called Roquebrune-Cap-Martin, 10 km from Monaco. Giancarlo provided the funds for the purchase of the apartment in an amount of €1 455 000,00.
76. He and the defendant were the shareholders, with him holding the usufruct and the defendant the remaining interest, a scheme which would have enabled her to re-unite the usufruct with the remaining interest in the event of his death and so become the legal owner of the company and its very significant asset. This would mean that, in the event of Giancarlo dying before the defendant during their relationship, she would have acquired unencumbered ownership of the company and would have been at liberty to use or dispose of the apartment as she saw fit. In the event of the termination of their relationship as a result of causes other than his death, the apartment would still have become the defendant's sole property
77. The defendant confirmed during oral evidence given on 30 July 2024 that she had sold the apartment in
2019. She declined to disclose how much it was sold for and where the proceeds are being held.

78. I have earlier above mentioned the two considerations that led to Giancarlo's decision to purchase immovable property in South Africa. When Giancarlo's bought the South African properties, the agreement between him and the defendant was simply to enjoy the use thereof during the summer season for a few years, after which they would sell them and repatriate the proceeds of the sale to her bank account in Europe and from there to his bank account where the funds originated from.
79. Giancarlo thus financed the purchases of two properties in Constantia, having agreed with the defendant that although the assets would be acquired in her name, they were not to be considered a gift or a donation, but would only be registered in her name for the reasons already referred to.
80. Giancarlo gave all the required mandates to the estate agents, including to buy or sell the properties, and co-signed the purchase agreements as a witness. He also had a right of signature in respect the defendant's CFM Monaco bank account, as well as her accounts in Switzerland and with Banca dello Stato. He assisted with the opening of these accounts, as also the ones in the defendant's name at First National Bank's Constantia branch.
81. The defendant never liaised directly with the various people involved in the acquisition and renovation of the properties, such as real estate agents, lawyers, conveyancers, architects, project managers, builders, subcontractors, and banks. Giancarlo did all of this but kept her fully informed of what was going on.
82. Giancarlo and the defendant visited South Africa on six occasions (between 11 April 2013 and 29 October 2014) inter alia to buy B[...] and then to sell it again; and buy K[...] C[...] and oversee the bulk of the renovations and refurbishing thereof.
83. On 20 June 2013 they made an offer of R11,5 million for B[...] which was signed by the defendant and accepted by the owner. It was transferred into the defendant's name on 2 December 2013. Giancarlo conducted all the negotiations with Mr Eugene Pienaar of Rawson Properties, attorney CLT Bollo of Biccari Bollo Mariano Inc., and the valuer, Mr R. Gouveia of Valuetec.
84. Giancarlo paid for the purchase of B[...] by transferring €1 350 000,00 from his Swiss bank directly to Mr Bollo's trust account and €100 000,00 from his Swiss bank account to the defendant's Monaco CFM bank account, and from there to Mr Bollo's trust account.
85. Giancarlo spent the rest of 2013 instructing his architects in Rome to devise a preliminary project for the renovation works that he wanted carried out according to his preferences and, once this was done, he obtained a quote from Steel Consulting. Steel Consulting having estimated the cost of the project to be about R10,5 million and that it would take 18 months to complete, Giancarlo decided not to continue with any further alterations but rather to buy a second property which would require less renovation and less time within which to do it.

86. He searched for another property during January and February 2014 and finally decided to buy K[...] C[...], to which he was introduced by estate agents Fine & Country. The defendant, as nominal purchaser, and Giancarlo, as witness, signed an offer to purchase on 7 March 2014 which was subsequently amended by their attorney, Mr Arno Watson, who had power of attorney to do so, and it was finally accepted. Transfer was registered on 6 May 2014.
87. K[...] C[...] was purchased for R14 million. To finance this Giancarlo transferred €300 000,00 from his Swiss bank account to the defendant's Swiss bank account from where she transferred it to her FNB Constantia bank account. The defendant paid the deposit from this, and transferred some of the funds to her FNB Constantia bank account. Giancarlo also transferred €1 200 000,00 from his Swiss bank account to the defendant's Swiss bank account from where she paid R12,6 million for the balance
- of the K[...] C[...] property purchase price. Further transfers of R2,8 million, R2,9 million and R900 000,00 were also made from the defendant's Swiss account to her FNB Constantia bank account.
88. Their last visit to South Africa together was between 29 October 2014 and 17 November 2014, on which date Giancarlo decided to terminate his relationship with the defendant, which he did on 19 November 2014.
89. Giancarlo made one last journey to South Africa by himself on 5 May 2015 to return on 22 May 2015 to assist the defendant, who was alone in Constantia busy with finalising the renovation work in respect of K[...] C[...].
90. B[...] was finally sold on 20 July 2015 with Mr Watson as the conveyancer. As indicated, the defendant retained the proceeds.

The evidence emanating from the anti-dissipation application

91. Giancarlo was concerned that the defendant would continue to dissipate his assets (she had access to his credit card for a substantial period after the end of their relationship, and was in control of the B[...] proceeds) and that he would not be able to recover anything even if he were to successfully institute an action for the recovery thereof. His apprehension was furthered by her refusal to come to any kind of arrangement with him.
92. He had taken some time to institute legal proceedings mainly because of efforts to resolve the matter amicably, which involved an exchange of 40 e-mails between him and the defendant in an attempt to settle the matter between them. The first proposal was made on 27 July 2015, and the last attempt which he had made to convince her to settle the matter amicably, and to which she did not respond, was made on 1 August 2016.

93. When Giancarlo deposed to the founding affidavit in the anti-dissipation application, he did not consider it necessary to burden the Court with the flood of correspondence between the defendant and him which followed upon the termination of their relationship, but she elected to refer to some of that correspondence, ostensibly because it supported her claim that he had donated the properties to her.
94. He therefore referred more extensively to the background in his replying affidavit, inter alia to show that his letters to the defendant were mostly generous settlement offers which almost invariably got rejected, and all of which got rejected in the final analysis. The correspondence shows, too, that the apartment near Monaco was acquired shortly after the commencement of their relationship as confirmation of his affection for the defendant and to provide her with security in the fulness of time. B[...] and K[...] C[...], however, were purchased significantly later following the commencement of the CONSOB investigation, and were registered in her name for the reasons already mentioned.
95. The objective facts, which the defendant had not challenged, such as when the apartment was purchased, when the CONSOB investigation commenced, and when B[...] and K[...] C[...] were purchased, as also the correspondence between them, confirmed Giancarlo's version that he did not donate three immovable properties valued significantly in excess of R50 million more than ten years previously, to the defendant.
96. The defendant's case in the anti-dissipation application was that "it was the Applicant's intention to donate the Cap Martin property [the apartment] (being the first property which the Applicant admits having given to me at the start of our relationship to 'reassure' [her] of his feelings for [her] and the K[...] C[...] property and cash from the proceeds of the sale of the B[...] property".[43]
97. It is telling that the defendant did not say "the proceeds of the sale of the B[...] property" but "cash from the proceeds" of that sale. I agree with the submission made on the plaintiff's behalf that this is an implicit acceptance of the fact that it was never Giancarlo's intention to buy two properties for the defendant in South Africa, and consistent with his offer to give K[...] C[...] to the defendant and to use some of the proceeds of the sale of B[...] to refurbish it - an offer that the defendant did not accept but which is in line with his position that K[...] C[...] was his to dispose of.
98. As far as Giancarlo's motivation was concerned, the defendant's case was that he had purchased the properties for her "by virtue of our relationship, out of generosity and a desire to provide me with security". This is so inherently improbable that it can safely be rejected. The amount involved is clearly more than security. It is wealth such as most people only dream of. He would never have parted with more than R50 million ultimately at the expense of his son, for whom he had to make provision before he made provision for the defendant.

99. After about 2 months following their separation, Giancarlo paid serious attention as to how he could address the situation. First, he had to calculate how much he should give to the defendant, and calculated what he had spent in respect of the three properties, the total of which was approximately €4 million. He proceeded from the assumption that had they been married, it would have been reasonable, fair and generous to let her have the equivalent of 50% of that amount, that is, about €2 million.
100. Next he considered how to achieve such an outcome, to which he applied his mind from December 2014 to March 2015, all the while managing the renovation works in progress at K[...] C[...] and the sale of B[...], while throughout having to attend to questions and problems that the defendant was posing through a large volume of e-mails and telephone calls, most of which concerned her future life.
101. Following receipt of a proposal from the defendant's law firm in Milan on 16 March 2015, Giancarlo arranged for an appointment with the lawyers in Milan on 23 March 2015 to whom he explained his case and presented a proposal in terms of which the defendant would effectively get €2,3 million which equated at the time to more than R30 million, the largest part of which was represented by 50% of the value of the three immovable properties. To avoid co-ownership of any of the properties, he proposed that she should become the full owner of K[...] C[...], particularly since she had previously verbally expressed this preference. His intention was to give K[...] C[...] (then worth €1 607 314,65) to the defendant, as well as €650 506,85 in cash and furniture valued at €42 178,50.
102. Between March 2015 and 1 August 2016 Giancarlo made several offers, all above €2,3 million in value, in attempts to reach a friendly agreement with the defendant which would have obviated a need for recourse to legal action, but she consistently refused his proposals, sometimes accepting a proposal but changing her mind a day later and rejecting it.
103. He came to suspect that this was a scheme to take advantage of some of what he was offering, such as renewal of the defendant's residence card in Monaco, the continuation of her employment contract, living in the apartment near Monaco, pocket money in excess of €2 000,00 per month and, finally, moving the furniture from the apartment to K[...] C[...].
104. The e-mail exchanges between Giancarlo and the defendant speak of, on the one hand, the fact that his intentions were always bona fide and that he was prepared to treat her generously and kindly and, on the other, her unreasonableness in the circumstances. His responses

were aimed at allaying the defendant's concerns and to demonstrate that he was "no emotional blackmailer". In the course of these emails he made a number of offers to the defendant which she never accepted. Not only had the defendant not placed any of the material contents of the correspondence in issue, but Giancarlo's responses were also consistent with his version of the facts as set out in the founding affidavit.

105. He said that he did not want any money from her, but that he was offering her money to ensure a future with dignity. He continued by saying that he was thinking of assigning a large part of his current possessions to her. However, before he did so, he needed her to be patient and wait for the sale of B[...] and for her to tell him how she intended disposing of the apartment. This was consistent with his position that the apartment was hers and B[...] his.
106. Of K[...] C[...] he said that this was “the property that I now wish to give you, to be your own, fully and independently, while I reserve the right to sell B[...] to recover a part of the money I invested, and which will also serve to raise cash for you”. This was consistent with his position that both properties belonged to him.
107. In his last e-mail to the defendant, in final attempt to convince her to accept a friendly resolution of the matter, Giancarlo made a proposal worth €2,525 million and expressed the sincere hope that she would take his advice and accept the proposal.
108. A significant aspect of the matter was that the defendant did not revert to say that the properties were hers to begin with, an omission consistent with what Giancarlo said the understanding between them had been.
109. The correspondence which the defendant invoked in the anti-dissipation application has to be seen for what it was, namely various and different settlement proposals, none of which corroborated her version that Giancarlo had donated three different properties, worth in the region of R50 million. Giancarlo’s version of the facts is substantiated by the many settlement proposals he had made to the defendant, including the ones referred to by her, all of which proceeded from the premise that the properties were his to dispose of as he saw fit, as also the fact that she did not challenge that.
110. As counsel for the plaintiff remarked, there is a boundary between generosity and madness. The fact that Giancarlo had put in place a Monaco company which owns the apartment which would have left the defendant as owner of an asset worth more than €1,4 million in the event of his death, was done by virtue of their relationship. The purchase of the South African properties was on another footing.
111. The defendant’s statement that Giancarlo had indicated that he had found another property, that is, K[...] C[...], and was going to sell B[...], is consistent with his version of the facts. In the founding affidavit in the anti-dissipation application Giancarlo said that during January and February 2014 he had searched for another property to buy and finally decided on K[...] C[...]. The defendant admitted the contents of this paragraph and continued by saying: “The Applicant indicated to me that he had found another property, the K[...] C[...] property, and was going to sell B[...] due to the high costs of renovating it ...”

112. This is consistent with Giancarlo's version that the property was not the defendant's, but his. Even on the defendant's version the plan was to buy a house in Constantia in South Africa to live in, not to buy two houses and for Giancarlo to sell the one and donate the proceeds thereof to the defendant while also giving the second house to her. It was never Giancarlo's and the defendant's intention to have two houses in Cape Town. They were actively trying to sell B[...].
113. Giancarlo instructed Mr Watson to attend to the transfer of B[...]. From the e-mails between him, estate agents and Mr Watson concerning B[...], and the correspondence between him, estate agents and Mr Watson concerning K[...] C[...], it is apparent that Giancarlo was the principal in the transactions. He appointed Mr Watson, and he took all the decisions regarding the purchasing, renovating, and selling of the properties. He arranged for payments and gave Mr Watson detailed instructions on a continuous basis in respect of how money should be allocated and where it should be invested. When requiring instructions or decisions, Mr Watson would refer to Giancarlo.
114. Giancarlo was the one who liaised with the owners of K[...] C[...], and he determined the commission which the estate agents would get. The emails indicate that it was within the parties' contemplation (as Giancarlo had said in the anti-dissipation application) that K[...] C[...] might in future be sold. Mr Watson knew what Giancarlo wanted to achieve with the purchase of that property: although the property would be registered in the defendant's name, she would not be the owner. Mr Watson accounted to Giancarlo throughout, not to the defendant, although Giancarlo had instructed him that his invoice should be in the defendant's name only.
115. The only time Mr Watson did not act on Giancarlo's instructions was when he transferred the proceeds of B[...] to bank accounts which Giancarlo assumed, although Mr Watson did not say so, were in the defendant's name. In view of the fact that Giancarlo had given Mr Watson detailed instructions regarding every aspect, even what could be considered as minutiae, of the purchase and sale of the properties, it was unusual for Mr Watson to transfer the proceeds of the balance of the sale of B[...] to the defendant's bank accounts without having received or requested instructions from Giancarlo.
116. Be that as it may, Giancarlo did not take issue with Mr Watson's conduct because, as is apparent from the papers filed of record in the anti-dissipation application, he had made proposals for the settlement of the issues between him and the defendant which, had they been accepted, would have seen her receive a significant portion of the proceeds of the sale of B[...].

The evidence emanating from the variation application

117. In his answering affidavit to the defendant's application for the variation of the anti-dissipation order (principally to allow her access to more money on a monthly basis), Giancarlo referred to what the defendant had not disclosed in her founding affidavit.

118. On of the aspects was that, so as not to delay the conclusion of the trial by becoming involved in unnecessary interlocutory disputes, Giancarlo had been prepared to deposit the sum of R1,5 million as security for costs into his attorney's trust account. Had he known that the indication of his willingness to provide security for the defendant's costs would almost immediately be followed by an application that her costs be financed out of the proceeds of the B[...] sale, he would not have agreed to furnish security for costs.
119. The defendant should have informed the Court of this fact because it had direct implications for her second prayer, which was that her attorney should be allowed to allocate a portion of the sum of the remaining proceeds of the B[...] sale held by them in an amount of R3,382 million towards payment of her legal fees. The fact that security had been provided in the amount of the defendant's own estimate of her fees and disbursements, was dispositive of her second claim in that variation application.
120. The defendant failed to disclose what had happened to the difference between the amount of R12 181 780,48 (the proceeds of the B[...] sale which were paid to her in two instalments during 2015) and the amount of R9,9 million which she claimed was all that remained. That meant that R2 281 781,48 of the proceeds had seemingly been spent in less than a year and a half, or in any event remained unaccounted for.
121. The defendant also did not disclose that by mid-2015 she had R202 813,82 in her non-resident FNB account 6[...], more than R488 614,57 in an FNB investment account, and more than R2 081,71 in an FNB business account in the name of AM Monaco (Pty) Ltd, which added up to another R693 510,12.
122. Giancarlo established, in the variation application, that R2,281 million of the proceeds of the B[...] sale effectively remained unaccounted for. Equally importantly, in the context of an application for a significant increase in the defendant's monthly "allowance" and for funds to be made available to finance her legal expenses, her attorneys of record had also declined to provide particulars of the whereabouts of almost R700 000,00 which, it was not in dispute, Giancarlo had paid into various bank accounts. The money unaccounted for, not counting the monthly allowance which Giancarlo continued to give her until December 2016 and which totalled approximately R300 000,00, amounted to approximately R2 939 134,00.
123. The additional correspondence which the defendant invoked in the variation application was mostly settlement offers, all of which she had rejected.
124. The futility of attempting to reopen the matter with reference to further correspondence between Giancarlo and the defendant, which she could have used in the context of the anti-dissipation application at the outset, was illustrated when the defendant invoked

a sentence from a letter dated 16 April 2015 from Giancarlo to her, reading as follows: “In my heart, I never believed that the second property (K[...] C[...]) belonged to me alone but simply to both of us, as a joint project which I would have left you in case of my demise.”

125. The statement is not inconsistent with Giancarlo’s claim regarding the agreement between the defendant and him in respect of K[...] C[...]. It signifies that it was within his power to bequeath K[...] C[...] to her. It was, however, clearly inconsistent with her claim that she was the sole owner thereof.
126. What the defendant did not refer to was Giancarlo’s statement in the same letter, where he said that he had the right to a refund of the costs, or at least a major portion thereof, incurred in respect of the purchase of B[...], the money which she then wanted to use to finance her monthly living costs and her legal expenses. In any event, if regard is had to the letter as a whole, it is clear that it was a settlement offer, in which Giancarlo’s “new proposal” (which the defendant rejected) would have seen her get R30 210 800,00.
127. Further correspondence put up in the variation application evidences that Giancarlo’s intentions were bona fide, and that he was prepared to treat the defendant generously. There is nothing which is inconsistent with his case in these proceedings.
128. In his answering affidavit Giancarlo reiterated that, when their ways parted in November 2014, his personal assets were of significantly diminished because of the world-wide financial and economic collapse at the time. Most of his investments had been dramatically hit and he could not afford to be excessively generous when he considered how best to discharge his moral obligation towards the defendant. He nevertheless paid serious attention as to how best he could address the situation. This is followed by a repetition of how, in the final analysis, he arrived at his proposal of €2,3 million, which he had previously explained in the context of the anti-dissipation application.
129. Against this backdrop Giancarlo said that he found it impossible to understand how the defendant could expect to whittle away the proceeds of the B[...] sale to which, as a matter of law, she had no entitlement.

The evidence of Manfredi de Filippo

130. Manfredi de Filippo, Giancarlo’s son, gave oral evidence. He has tertiary qualifications in law and banking.
131. Shortly before he died, Giancarlo wrote a power of attorney to Manfredi to deal with the lawyers and all his affairs. Manfredi had promised his father that he would see the case through. Manfredi has no vendetta against the defendant but came to South Africa out of filial duty to his father.
132. He testified that Giancarlo had called him on a regular basis to assist him with the case, to understand general concepts of law, and to help him draft and communicate with his legal representatives.

133. On Manfredi's birthday, the day on which Giancarlo had been re-diagnosed with cancer, he asked Manfredi to become more involved in the case to assist him, because the diagnosis of cancer was a death sentence. Thereafter they had worked on the case together with renewed vigour and focus.
134. Following the termination of the relationship, the defendant's financial future was the subject of substantial contemporaneous and subsequent conversations between Giancarlo and Manfredi. Having just come out of a bruising divorce, Giancarlo was not going to remarry, but he wanted to be generous and to provide for the people he had been in a relationship with. That was also the case with the defendant.
135. Giancarlo had confided in Manfredi that when the defendant came to Monaco when they first met, she was a woman of extremely limited means, and he maintained her throughout the relationship. Following the termination of the relationship Giancarlo still wanted to do well by her and made an offer of the order of €2,3 million that he would remit to the defendant, having sold the properties. This was entirely a matter of his generosity which was disproportionate to what Manfredi would have advised, but it was Giancarlo's right and Manfredi respected him for that.
136. Giancarlo, being Italian, wanted to a good head of family. He assisted the defendant's mother financially, and made substantial financial provision for the defendant's brother in the form of loans (but effectively donations) worth about €50 000,00 to €70 000,00. Manfredi is in possession of the loan contract in his capacity as executor to his father's estate, but Giancarlo had asked him never to enforce it.
137. In response to the defendant's claim that Giancarlo bought two properties for her in South Africa, Manfredi testified that Giancarlo repeated many times, contemporaneously and during the litigation afterwards, that he was aging; he had suffered reversals of fortunes during his divorce and the investments that he retained subsequent to that did not perform as well as he had expected; and that it was not a particularly good time in global finance.
138. Manfredi did not regard Giancarlo as the most gifted of business people. His world-weariness was getting worse, and he was losing trust in a number of institutions broadly. He was slightly dissatisfied with life in Monaco and yearned for new horizons. He was ensnared in legal matters in Italy where he was a co-defendant, and he had become concerned that the Italian state was over-reaching and would continue to over-reach. As an aging man, the winters in Europe were no longer attractive and Giancarlo had thought, in consultation with the defendant who had lived in South Africa previously, that South Africa would be a good place to be. He discovered to his great pleasure that there were many Italians here, usually involved in the wine and restaurant industry, and decided that he wanted to acquire a property here to spend the winter months. Giancarlo believed that South African real estate, as long as it was not levered, was likely to be a good investment.

139. Because Giancarlo was concerned about the over-reach and the delicate legal situation in Italy, he had thought to register the first property, B[...], in the defendant's name. CONSOB and his general character explained why he had entered into this arrangement with the defendant. Manfredi remembered that, after a 45-minute diatribe about roofers who never showed up to restore B[...], Giancarlo decided that there was another property in Constantia which was far nicer, better located, with better bones, and "more amenable to fix up". Since it was going to be sold quickly, he decided that he would buy K[...] C[...] even before selling B[...] and that, when he sold B[...], the money had to come back to him.
140. Giancarlo took all the decisions to the degree that he was there with the conveyancers, and the accountants, and did all the designs himself. The money (all of it) came from Giancarlo and there was no doubt that when he wanted B[...] to be sold, it was sold and when he wanted K[...] C[...] to be acquired, it was acquired. He paid for the work that was performed. When the matter came to a head, the three properties (including the apartment near Monaco) represented more than 50% of his estate.
141. Manfredi testified that the defendant gave Giancarlo no support, only problems, and that she antagonised almost everyone. There were voluminous exchanges of e-mails between Giancarlo and the defendant after the termination of the relationship. Manfredi's general understanding of it is that they concern broadly the matter of Giancarlo's wish to see her well looked-after following the end of the relationship, and Giancarlo was concerned about various particulars by which this could be achieved.
142. Manfredi referred to an e-mail of 8 March 2014 from Giancarlo to Mr Watson in which he mentions that they might want to re-sell the property and re-export the money in future, which was consistent with Giancarlo's thinking about the properties. They were supposed to be summer properties to be acquired and used and then, when it would no longer be convenient, or he could not take

enjoyment out of them, they would like any holiday property be re-sold and the funds repatriated to him. Giancarlo's intention

was to find one property, not two, and he was very much the decision-maker in the fate of these assets.

143. Manfredi said that the defendant was aware of Giancarlo's legal problems. He pointed to correspondence from the defendant to Giancarlo to the effect that in accommodating him with the sale in progress at the price that he had accepted for B[...] she would transfer the proceeds as he had requested except for an amount needed to cover all costs of the housing claim and her upkeep until the sale of the company in France. This, Manfredi said, was consistent with the conversations that Manfredi and Giancarlo had regarding arrangement of his affairs in a way that would be morally fair to the defendant.

144. With reference to correspondence to which he had been referred, Manfredi said that it testified quite clearly to the fact that Giancarlo was the owner of the properties. As to the defendant saying that “I insist on asking you how much you think to leave me of the sale of B[...] Cape Town and I beg you to answer”, he commented that she was obviously not talking about an entitlement but she was asking for something.
145. In an e-mail of 27 July 2015 Giancarlo inter alia told the defendant that he had donated the apartment to her after two years of their cohabitation but that he never spoke of donating either B[...] or K[...] C[...] to her and that she knew very well that their registration in her name was exclusively due to his need to protect his investments from possible recourse action, following his well-known judicial “events”. Manfredi commented that this was entirely consistent with what Giancarlo had told him, as it was consistent “with the analysis of his estates when he was then deceased afterwards”.
146. Following the rejection of Giancarlo’s last settlement offer he had become extremely disillusioned and felt betrayed by the defendant. As a result he resorted, for the first time in his life, to legal action.
147. The apartment was furnished twice. The first time Giancarlo paid for everything which the defendant, without notifying him, subsequently shipped in a container to South Africa. Giancarlo had to refurbish it again. Shortly after he died Manfredi went there with staff to select for transfer Giancarlo’s remaining movable assets, mainly clothes, furniture, and some objects of artistic value. The next day the defendant arrived at the apartment and called the police, claiming that she did so because the neighbours had reported that some suspicious people were emptying the building, and she wished to protect Giancarlo’s assets. Manfredi believes that she was foiled in an attempt to take his father’s belongings.
148. Manfredi concluded his evidence by stating that Giancarlo lived his final years in a way that no human being should. He was consumed by this case, and by the fact that what he thought was rightfully his and rightfully his heir’s was going to be denied him. Despite the cancer, despite the work, he would wake up every morning and write long e-mails to his lawyers, compiling Excel sheets and spreadsheet models to show what evidence there was. “This was a case that consumed him, and he did not live well for it.”
149. Manfredi believes that the defendant had litigated his father to death. She brought application upon application, vexatious and without merit, in attempts to delay the trial and the final determination of the dispute. The last discussion that Manfredi had with his father was about the litigation.

The circumstances in which default judgment was given against the defendant

150. I have mentioned that the defendant did not cross-examine Manfredi, and that judgment was given in her absence at the resumption of the trial on 2 September 2024. This came about as follows.

151. Since 2016, when the litigation between the parties commenced, attorneys have come on record for the defendant on eight occasions, and she was, at different times, represented by at least five advocates, three of whom were senior counsel. On the last two occasions when the trial was set down (being 12 March 2024 and again on 29 July 2024), the defendant was unrepresented. This caused, on each occasion, a postponement to assist her in obtaining legal representation, to no avail.
152. It is necessary to take a step back.[44]
153. On 3 November 2023 (six years after the institution of the action) the Honourable Justice Cloete issued a certificate of trial readiness. At the time, the plaintiff formally placed the following on record: "The Plaintiff records that he is prejudiced by the Defendant's continuous attempts to delay the finalisation of this matter. The Defendant records that she does not agree but that she too wishes the matter to be finalised as quickly as possible. The Acting Deputy Judge President has thus granted permission for an expedited trial date, preferably in the first term of 2024."
154. The transcript of the proceedings indicates that Cloete J emphatically urged the defendant to obtain legal representation, and the services of an interpreter, without delay.
155. The Registrar allocated 12 March 2024 as the expedited trial date. It soon became apparent that the defendant was not keen on going to trial, and she instituted a second application for the rescission of the anti-dissipation order barely a month before the trial was to commence. She also failed to supplement that trial bundle, as she had been directed to do by Cloete J in November 2023 in preparation for trial.
156. The plaintiff's attempts nevertheless to have the trial commence on 12 March 2024 came to naught. On 13 March 2024 the Honourable Acting Justice Sidaki, having declined to determine the second rescission application, postponed the trial to 29 July 2024 for the reason that the defendant was still unrepresented.
157. Whilst giving his judgment postponing the trial, Sidaki AJ expressly directed the defendant to get legal representation immediately, granting a postponement specifically to give her an opportunity to do so. He pointed out that the defendant had been cautioned repeatedly by the plaintiff's attorneys to ensure that her legal representation was ready for trial. Sidaki AJ gave firm directives to the defendant to appoint legal representatives without delay and to have them liaise with the plaintiff's legal representatives to secure the commencement of the trial on 29 July 2024. It is clear from the transcript of the proceedings that the defendant understood this. She confirmed that she understood and that she would give effect to the directives.
158. Yet, on 29 July 2024, when the trial commenced, the defendant was still unrepresented, eventually resulting in a postponement of the matter on 31 July 2024 for one month to 2 September 2024 in order for her to obtain legal representation. This was done after argument by both parties of the second rescission application and the contempt application,

and after the plaintiff had given his evidence in chief. The defendant insisted that she was not capable of cross-examining the plaintiff, and that she required legal representation. She also maintained that her mental health was suffering as a result of the litigation, and that she was for that reason unable to continue on her own.

159. The reasons proffered by the defendant for her failure to engage legal representation are not satisfactory. In her oral evidence before this Court in opposition to an application to hold her in contempt of court,[45] the defendant explained that she had approached various attorneys, but that they were not willing to assist her. She provided a list of the attorneys that she approached, but could not be specific as to exactly when she asked for assistance from each of them. It transpired that the defendant had requested those attorneys to assist her on a contingency basis as, so she stated, she could not afford legal representation.
160. Under cross-examination the defendant admitted that she had in 2019 sold the apartment in France, for which Giancarlo had paid €1 455 000,00 in 2009. I have referred to the fact that the latter had purchased the apartment in a real estate company of which he and the defendant were the only shareholders, with him holding a usufruct and the defendant the remaining interest, resulting in her becoming the legal owner of the company and its asset upon his death in 2018. She was at liberty to use or dispose of the apartment as she saw fit.
161. Taking into account the current exchange rate, and assuming that the apartment was sold for the same amount as that for which it had been purchased (she has not protested that it was sold for less), the probabilities are that the defendant has access to some R28 million from the sale.
162. The defendant was, however, adamant that the sale price and the whereabouts of the proceeds of the sale were none of the plaintiff's or this Court's business, and refused to disclose what she had done with the funds. The impression with which the Court was left was that the defendant held the view that her overseas funds were to be left untouched, and that she was unwilling to use them to defend the action in South Africa.
163. The defendant was, for the same, reason, unwilling to engage an interpreter for whose services she had to pay. She challenged the Court with the fact that, in the magistrate's court, she had on a previous occasion utilised the services of an interpreter for free. When it was pointed out to her that she would have to pay for the services of an interpreter in the High Court, she flatly refused to do so on the basis that she could not afford it.
164. The defendant's evidence also indicated that she did not trust or "like" lawyers who displayed anything but the fullest confidence in her case. It appeared that several of the firms that she had consulted conveyed doubts about the merits of her case to her. This resulted in her not engaging them.
165. According to the defendant, most of her legal representatives had failed her either because they were in cahoots with the plaintiff's legal team or intimidated by the plaintiff's senior counsel – allegations without substance that have been repeated throughout

correspondence and in affidavits before this Court, as well as before Cloete J at the time when the matter was declared trial ready, and before Sidaki AJ when the trial was set down for hearing on 12 March 2024.[46] Despite the defendant having been warned against the making of these unsubstantiated allegations, she has not desisted from doing so.

166. Be that as it may, the defendant was warned on 31 July 2024 that the trial would proceed on 2 September 2024. She was dissatisfied with the date and asked for more time, because she said that she had planned to take a trip to Italy at the end of August 2024. When the Court asked her for confirmation of her travel arrangements, she conceded that she had not in fact made any arrangements yet.
167. The Court was not inclined to delay the trial yet again for more than a month. The defendant pertinently asked what would happen if she did not come to Court on the date of the resumption of the trial. The Court warned her not to do that, as the matter could proceed in her absence. It was impressed upon her that she should approach an attorney without delay, and not at the last minute. The defendant understood all of this.
168. The plaintiff's attorney sent correspondence to the defendant between 31 July 2024 and 2 September 2024 to remind her that she should act expeditiously. This had no effect. On 30 August 2024, the Friday afternoon prior to the resumption of the trial, the defendant called for a meeting with the plaintiff's representatives and with me as presiding judge. It transpired at the meeting that she had still not obtained legal representation. She gave no reason for the situation other than stating that it was for the same reason as before – meaning that she could not pay for legal services. That excuse is not credible. The defendant cannot cry poverty on the one hand, and on the other refuse to tell the Court what the status is of the proceeds of the sale of the apartment in France.
169. The defendant was asked whether she intended to seek a postponement when the trial resumed the following week, and she expressly replied in the negative. She made much of her alleged fragile mental health, and asked the Court to take cognizance thereof. She offered to email a medical certificate from her general practitioner. I requested that such certificate be furnished under cover of an affidavit from the general practitioner, or that the latter make herself available to give evidence as to the defendant's condition on the resumption of the trial.
170. The defendant sought a directive to the effect that the trial would continue online, so that she would not have to come to court. The plaintiff opposed the request, and I declined it because of the practicalities involved in running a trial remotely. The defendant resided locally and had easy access to the Court. Running virtual hearings is, moreover, not an entitlement in this Division, and there should be cogent reasons for such an arrangement. The meeting concluded with the defendant being warned to appear in Court on the Monday morning.

171. On 2 September 2024 at 10:00, when the matter was called, the defendant was absent. After having stood the matter down for inquiries to be made, the plaintiff's counsel informed me that the defendant had sent email correspondence to his attorney at about 09:45 that morning. The email had not immediately been picked up on given the plaintiff's team's efforts to get to Court in time for the start of the hearing. It transpired that she had sent the email to my registrar, too, who saw it at about 10:15 and forwarded it to me. There had been no prior phone call to alert anyone to the email.
172. In the email the defendant stated that her health status "significantly impairs [her] ability to be physically present at the upcoming trial scheduled for today 2 September 2024". She stated that her "health issues have been exacerbated by the prolonged stress of the legal proceedings", and asked the Court to take this into account in dealing with the matter.
173. The defendant attached a certificate from her general practitioner. It was dated 29 August 2024 and recommended "sick leave" from 29 August 2024 to 8 September 2024. It described the diagnosis and stated that the defendant had been referred to another healthcare provider for evaluation. The certificate was not given under cover of an affidavit, and the defendant made no mention in her email of her general practitioner being available to furnish oral evidence.
174. The defendant further attached an email message from a receptionist at a private hospital informing the defendant that an appointment with the healthcare provider in question would only be available in October 2024. The receptionist indicated that an in-person consultation would be required. The email had been sent on 29 August 2024 at 17:22, that is, after the meeting with the defendant on the Friday afternoon before the trial.
175. The final attachment was a letter from a doctor in Rome who had seen the defendant in February 2024. He prescribed medication to treat the condition.
176. All of this correspondence is a far cry from constituting evidence of a condition that required immediate medical assistance and that would have prevented the defendant from attending Court in person.
177. The defendant may be a lay person, but lay people are also expected to play by the rules. The defendant had litigated this matter for eight years, and she knew what her responsibilities were. The Court had on more than one occasion bent over backwards to assist her. Despite this, the defendant's strategy to delay the trial once again at the last minute was transparent. She had been wilful in her failure to obtain legal representation. Her oral evidence had previously revealed that she did not genuinely try to carry out the Court's directives, in that she persisted in refusing to pay for legal advice despite the fact that she was on the probabilities more than able to do so. The defendant cannot cry poverty on the one hand, and on the other refuse to tell the Court what the status is of the proceeds of the sale of the apartment in France. As I have mentioned, too, the defendant

refused to appoint any legal representative who dared to give her objective advice as to the merits of her defence. To overcome these obstacles, the defendant started to beat the health drum.

178. When it becomes clear that a litigant's conduct is aimed at delay and at abusing the process of Court, it should not be tolerated. The plaintiff had yet again travelled from Italy for the resumption of the trial. His father's estate needed to be wound up. Costs were mounting. In these circumstances, I was not inclined to delay the finalization of the matter any longer. There was no postponement application before me, and I accordingly allowed the plaintiff to wrap up such evidence as he wished to give, heard argument on his behalf, and granted an order in the defendant's absence. I was of the view that the plaintiff's evidence,

viewed as a whole, had overcome the requisite standard of proof, and the defendant furnished no evidence to contradict it.

Costs

179. Whilst the defendant bemoaned the fact that the litigation between the parties was dragging on unreasonably, she was herself to blame for the state of affairs. She complained about a lack of legal representation, but persisted in the attitude of not wishing to pay for the services of an attorney, and of not trusting any legal representative who offers advice that did not accord with

her own beliefs in the merits of her case. She made offensive allegations of the most serious kind against most of the attorneys

and advocates involved in this matter to date, and it is thus small wonder that she ultimately claimed that none of the law firms which she had approached was prepared to represent her.

180. The defendant showed a marked disrespect for the Court and the plaintiff in the manner in which she approached the trial, and in the manner in which she conducted herself in court. Her conduct was objectively vexatious. I was of the view that it warranted an award of costs on the attorney and client scale.[47]

Order

181. In the circumstances, I granted the order set out at the beginning of these reasons.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the plaintiff: J. C. Heunis SC, instructed by Webber Wentzel Attorneys

The defendant in person

[1] Under Rule 15(3) of the Uniform Rules of Court.

- [2] The current plaintiff is Giancarlo's sole heir.
- [3] By court order 16 June 2019, in the light of Giancarlo's death in August 2018.
- [4] She initially retained occupation initially with Giancarlo's consent, but the current plaintiff has not given consent for her to remain there.
- [5] Under case number 23724/2016.
- [6] The defendant subsequently brought a so-called variation application inter alia to increase this amount, which application was refused in May 2018.
- [7] Following an unsuccessful application for the rescission of the anti-dissipation order: unreported judgement under case number 23724/2016, delivered on 8 September 2017.
- [8] The details of the various interlocutory applications are set out in five unreported judgments of this Court, delivered on 8 September 2017, 25 May 2018, 22 February 2022, 11 September 2024, and 16 September 2024 respectively.
- [9] A year before the end of their relationship.
- [10] Giancarlo's son was able to give oral evidence as to his father's mindset in deciding to purchase the properties.
- [11] Which eventually did not happen.
- [12] Particulars of how much money Giancarlo transferred to the conveyancers and to the defendant for onward transfer to them, to whom the transfers were made, when they took place, and so forth, are set out in the founding and replying affidavits in the anti-dissipation application.
- [13] 1920 AD 123 at 128.
- [14] Not even words are essential, since an acceptance may be inferred from conduct: *Timoney & King v King* 1920 AD 133 at 141.
- [15] The provisions of section 28 are not relevant to present purposes.
- [16] *Du Plessis v Nel* 1952 (1) SA 513 (A) at 527E.
- [17] *Bradfield Christie's Law of Contract in South Africa* (7ed) at 132-1333 usefully lists contracts that have been held to fall outside the definition of the section 2(1) concept of alienation.
- [18] 1981
- (3) SA 1039 (AD), concerning the forerunner to section 2(1) of the ALA.
- [19] At 1050A-B.

- [20] Under case number 13020/2005 (unreported).
- [21] The judgment is not in the court file and Le Grange ADJP's (the presiding judge) registrar was unable to be of assistance. The quote is from the plaintiff's heads of argument in the defendant's unsuccessful application for leave to appeal.
- [22] 1979
- (3) SA 754 (A) at 762G-H.
- [23] See also D&H Piping Systems (Pty) Ltd v Trans Hex Group Ltd and another
- [2006] ZASCA 29; 2006
- (3) SA 593 (SCA) at 699G-H.
- [24] 1966 1 PH A36 (A).
- [25] 1974
- (3) SA 506 (A) at 531-532.
- [26] 2012
- (5) SA 230 (SCA) at 234I-J.
- [27] Pan American World Airways Inc v SA Fire & Accident Insurance Co. Ltd 1965
- (3) SA 150 (A) at 175C.
- [28] See Delfs v Kuehne & Nagel (Pty) Ltd 1990
- (1) SA 822 (A) at 827B-828B.
- [29] 2019
- (3) SA 379 (SCA) at paras [16]-[21].
- [30] 1952
- (1) SA 732 (N) at 734A-B and C-D.
- [31] Ocean Accident & Guarantee Corporation Ltd v Koch 1963
- (4) SA 147 (A) at 159C.
- [32] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977
- (3) SA 534 (A) at 548.
- [33] Terry v Senator Versekeringsmaatskappy Bpk 1984
- (1) SA 693 (A) at 699C-F.
- [34] New Zealand Construction (Pty) Ltd v Carpet Craft 1976

(1) SA 345 (N) at 349.

[35] 1972

(1) SA 26 (A) at 37.

[36] Madibeng Local Municipality v Public Investment Corporation Ltd 2018

(6) SA 55 (SCA) at 61F-H.

[37] Superior Court Practice Volume 2 (2ed) at D1 (Rule 38-9).

[38] 1918 TPD 420 at 422; and see Grant v Grant 1949

(1) SA 22 (C) at 30.

[39] The current plaintiff deposed to the founding affidavit in the application to admit Giancarlo's affidavits in evidence.

[40] Instituted by the defendant.

[41] Refusing the application.

[42] This was less than a month before Giancarlo died.

[43] Emphasis supplied.

[44] The correspondence and events leading up to the allocation of 29 July 2024 as the trial date are set out in more detail in the unreported judgment dated 16 September 2024 delivered in respect of the contempt application.

[45] On 30 July 2024. The defendant had failed to deliver an answering affidavit but wished to oppose the application.

[46] Similar allegations were made before the Taxing Master at the taxation in 2024 of various costs orders that had been granted against the defendant over the preceding years.

[47] Johannesburg City Council v Television and Electrical Distributors (Pty) Ltd and another 1997 (1) SA 157 (A) at 177D: "...in appropriate circumstances the conduct of a litigant may be adjudged 'vexatious' within the extended meaning that has been placed upon this terms in a number of decisions, that is, when such conduct has resulted in 'unnecessary trouble and expense which the other side ought not to bear' (In re Alluvial Creek 1929 CPD 532 at 535)."

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