

SOUTH AFRICA / JUDGMENT

Devi v Renay and Others (2015/42991) [2022] ZAGPJHC 126 (2 March 2022)

[2022] ZAGPJHC 126**COURT**

South Gauteng High Court, Johannesburg

BEFORE

C Thompson

CASE / FILE NUMBER

2015/42991

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: 2015/42991****(1)****REPORTABLE:**

NO

(2)

OF

INTEREST TO OTHER JUDGES: YES

(3)

REVISED.

DATE:

2 March 2022

In the matter

between:

MANSINGH

URMILLA ROSHNEE

DEVI

Plaintiff

And

KATHAWAROO

RENAY First

Defendant

KATHAWAROO

HIMALEDEVI Second

Defendant

LIBERTY

GROUP

LIMITED Third
Defendant
OLD
MUTUAL LIFE ASSURANCE
CO.
Fourth
Defendant
KATHAWAROO
ANASH
Fifth
Defendant

JUDGMENT

THOMPSON AJ:

- [1] The Plaintiff and the First Defendant, both legal professionals within the jurisdiction of this Court, were previously married to one another. Although the marriage has come to an end during 2013 already, the parties remain at loggerheads with one another. In respect of this matter, it is due to the fact that First Defendant and his mother, the Second Defendant, together with the First

Defendant's younger brother, the Fifth Defendant, engaged in certain actions post the termination of the marriage which irked the Plaintiff. A brief background of events is first necessary.

- [2] During the subsistence of the marriage, two life policies were taken out over the life of the Second Defendant. The one life policy was taken out with the Third Defendant ("Liberty Life"), effective from 1 December 2006 ("the Liberty policy") and the other life policy was taken out with the Fourth Defendant ("Old Mutual"), effective from 6 October 2006 ("the first Old Mutual policy"). In respect of both policies, the Plaintiff was nominated as the sole beneficiary. Due to an error on the part of Old Mutual, the nomination was not correctly recorded, and the Second Defendant was recorded as the beneficiary of the first Old Mutual policy. The Plaintiff was recorded correctly as the sole beneficiary in respect of the Liberty policy. Nothing turns on the incorrect recordal of the Second Defendant as beneficiary in the first Old Mutual policy as it is common cause between all of the parties that the Plaintiff was supposed to be recorded as the sole beneficiary of the first Old Mutual policy.
- [3] During the course of 2008, a second life policy was taken out over the life of the Second Defendant with Old Mutual, effective from 2 July 2008 ("the second Old Mutual policy"). The Plaintiff was again nominated as the sole beneficiary under this policy.
- [4] It is common cause that the Plaintiff paid the premiums in respect of each of the policies from their respective effective dates to sometime in 2014. During 2014, and unbeknownst to the Plaintiff, the First, Second and Fifth Defendants caused the beneficiaries of the policies to be changed to the First and Fifth Defendants and the Fifth Defendant took over the

payment of the premiums of the policies. When the Plaintiff realized that she has been removed as the beneficiary from the policies, she took issue therewith and demanded that she be restored as the beneficiary of the policies. The Plaintiff contends that her right to be so restored arises from an agreement that she will be the beneficiary to the policies and that she will remain the beneficiary to the policies. According to the Plaintiff, her right to be the beneficiary to the policies is a contractual right and is not at the discretion of the Second Defendant. Her removal as beneficiary can only, so the Plaintiff contends, occur by way of agreement between herself and the First and Second Defendants. The First, Second and Fifth Defendants refused to accede to the Plaintiff's demand, hence the present action.

- [5] During the course of the trial, it became apparent that the Plaintiff and the First Defendant are diametrically opposite people. The Plaintiff is driven to succeed in all that she does. She describes herself as a "very busy and very successful legal practitioner". The First Defendant, on the other hand, describes himself as emancipated at the hands of the Plaintiff and sought to downplay his ability as a legal practitioner when in private practice. I will touch upon this again in due course.
- [6] Prior to dealing with the evidence in this matter, I propose to deal first with the pleadings and the respective cases the parties brought to court.

The Pleadings

- [7] The Plaintiff advanced two claims against the Defendants. In respect of claim 1 the Plaintiff pleaded as follows:

"12. On or about June 2006 and at Johannesburg, the plaintiff, first and second defendant entered into an oral agreement. They each acted personally.

13. Material terms of the oral agreement were, inter alia:
- a) Second defendant will obtain life insurance for the benefit of the children;[1]
 - b) Plaintiff will be named beneficiary in respect of the policies obtained;
 - c) At all material times plaintiff will represent the children;
 - d) Plaintiff will pay the monthly insurance premiums;
 - e) The policies obtained will remain in force and to the benefit of the children, throughout the lifetime of the second defendant; and
 - f) No amendments or endorsements to the policies will be effected without the unanimous consent of Plaintiff, first and second defendants."
- [8] The First, Second and Fifth Defendants unequivocally deny the aforesaid allegations in their plea. They state:

“Each and every allegation contained in these paragraphs are denied as if specifically traversed and the plaintiff is put to the proof thereof.”

- [9] The First, Second and Fifth Defendants then pleaded an oral agreement (defined in their pleadings as “the first oral agreement”)

between the first, second and fifth defendants in relation to the Liberty Policy and the first Old Mutual policy. In this regard the aforesaid defendants pleaded:

“4.2 The defendants plead that during or about 2006 and at Johannesburg, the first, second and fifth defendant acting personally entered into an oral agreement. . . in terms whereof it was expressly, alternatively impliedly further alternatively tacitly agreed that:

4.2.1 the second defendant will permit that life insurance cover will be obtained on her life with the third and fourth defendant/s respectively (“the life policies”)

4.2.2 the proceeds of the life policies would be obtained for the benefit of all the second defendant’s direct descendants in the first and second degree, which includes the children born of the relationship between the plaintiff and the first defendant and any child or children born of the relationship between the fifth defendant and his spouse.

4.2.3 the second defendant would nominate the plaintiff, as her then only daughter in law and the spouse of her eldest son (first defendant) as a beneficiary on the said life policies and that she (the plaintiff) would administer the proceeds of the life policies on the death of the second defendant, for the benefit and well being of all the second defendant’s descendants equally.

4.2.4 the plaintiff would only be entitled to remain as beneficiary on the life policies for as long as she is a member of the Kathawaroo family and remain married to the first defendant.

4.2.5 the plaintiff would be substituted as beneficiary on the life policies upon the dissolution of her marriage to the first defendant and/or on the death of the plaintiff.

4.2.6 the first defendant agreed to pay the premiums on the life policies, to the third and fourth defendants.”

- [10] A second oral agreement, pertaining to the second Old Mutual policy was also pleaded, on the same terms, mutatis mutandis, as the first oral agreement.

- [11] In respect of both the pleaded first and second oral agreements, the First, Second and Third Defendants pleaded that the plaintiff agreed to be nominated as the beneficiary on the basis as pleaded by the Defendant. This averment was formulated as follows:

“Subsequent to the conclusion of the first oral agreement and the second oral agreement, the plaintiff agreed to be nominated as beneficiary on the basis as pleaded above.”

- [12] Glaringly absent from the pleaded version by the First, Second and Third Defendants are necessary pleaded averments such as

- i. who represented the First, Second and Third Defendants in respect of the alleged agreement so reached with the Plaintiff;
- ii. When was the alleged agreement reached;
- iii. Where was the alleged agreement reached.
- iv. How was the alleged agreement reached.

In short, the First, Second and Third Defendant sought to plead that the Plaintiff bound herself to an agreement without properly pleading the existence of an agreement between herself and, so it would seem, the First, Second and Third Defendants.

- [13] The aforesaid failure to properly plead the agreement relied upon whereby the plaintiff agreed to be the beneficiary, is to be found in paragraph 7 of the Defendants' amended plea, which reads:

"7.1 The defendants admit that the plaintiff initially paid the premiums in respect of the life policies with the third and fourth defendant's

[sic], but pleads further that such payment was made pursuant to an oral agreement concluded during or about 2005, between the plaintiff and the first defendant, both acting personally and at Johannesburg ("the spouse agreement").

7.2 In terms of the spouse agreement, it was expressly, alternatively impliedly, further alternatively tacitly agreed that:

7.2.1 the first defendant would resign from his employment in order to take care of the two minor children, born of the marriage, on a full time basis;

7.2.2 the plaintiff would continue to work and would be responsible for all the financial needs of the common household and all the financial obligations of the first defendant, for so long as he (the first defendant) was not employed.

7.3 The payment of the premiums in respect of the life policies was a financial obligation of the first defendant and the plaintiff was accordingly obliged to pay the same."

- [14] In effect, the Defendants' pleaded case was that a pre-existing spousal agreement was in force whereby the plaintiff would pay for the first defendant's financial obligations. The financial obligation that arose from the first and second oral agreements allegedly existing between the first, second and fifth defendants would then, due to the spousal agreement, be for the account of the plaintiff.

- [15] As will be dealt with later on, the evidence presented by the Defendants' did not conform with the pleaded formulation of its case. A proper formulation of a party's case in pleadings is required in order to ensure that there is clear notice to the Court as well as the opposing party upon which issues reliance will be placed.[2] The First, Second and Third Defendants' failure to properly and lucidly plead their case in line with the evidence that they presented

gave rise to an objection by the Plaintiff to certain evidence being led by the First, Second and Third Defendants. I elected to exercise my discretion, limited as it may be, to allow the First, Second and Third Defendants to lead evidence at variance with their pleaded version. [3] However same was only permitted in so far as an entirely new version of events was not being testified to. In my view, to so allow the evidence, would assist in determining the credibility of the relevant witnesses.

[16] The second claim by the Plaintiff is to give effect to a written cession (“the cession”) in respect of Liberty policy, which cession the Second Defendant allegedly effected in favour of the Plaintiff during September 2009. The Defendants denied the cession in their plea based thereon that persons representing the Plaintiff, purporting to be employees of Liberty, misrepresented to her that the cession document is no more than a change of address document. Yet again no facts were pleaded as to when or where these alleged events took place.

[17] Whilst I am dealing with the issue of pleadings, I must point out that at the end of the case, after all the evidence has been led and after the Plaintiff’s argument had been advanced, there was an expressed intention to move for an amendment at the end of the First, Second and Third Defendants’ argument. The sequence of events in this regard is that the moving of the proposed amendment was brought to my attention by the Plaintiff’s Counsel at the end of his argument. There was no attempt by the Defendants’ counsel, prior to argument commencing, of bringing this aspect under my attention. I enquired from Counsel for the Defendant, prior to her commencing argument, what the Defendants’ intention is with the proposed amendment. I was informed that application will be made for the amendment at the end of the Defendants’ argument. I indicated that I am not amenable to such an approach as it would constitute an amendment, at the end of a case, which may give rise to further evidence or argument. I required the Defendants to, then and there, seek the amendment.

[18] It then turned out that the proposed amendment is not a mere simplistic or formalistic amendment but seeks to introduce a conditional

counterclaim. To allow such amendment would, of necessity, give rise to a plea to the conditional counterclaim and additional

evidence having to be led. In any event, the introduction of a counterclaim at this belated stage of the proceedings, require a substantive application to be brought in terms of Rule 24(1).[4] No such application was brought. When these aforesaid difficulties were pointed out, the Defendants elected not to proceed

with the amendment.

[19] In the light of the above delineated scope of the matter, I will now deal with the evidence as presented.

The Plaintiff's case

[20] The Plaintiff's evidence was, in large chunks, argumentative and repetitive. Despite these flaws, the Plaintiff's factual evidence was clear and logical.

[21] The Plaintiff, due to her self-proclaimed success as counsel, found herself as paying for 'almost everything' in the

erstwhile matrimonial home (common household expenses), save for the personal expenses of the First Defendant which he could afford out of his salaried employment. Being ambitious herself, the Plaintiff wanted her minor children to be afforded the opportunity to undergo tertiary education, preferably overseas. As a result, she wanted to take out education policies for the children. After taking advice from a family member who is an insurance broker, Mr. Hariparsad, in Newcastle, and having discussed the matter with the First Defendant, it was decided that taking life cover on the life of the Second Defendant is the most viable option. In furtherance of the decision, the First Defendant discussed the matter with the Second Defendant who agreed thereto.

[22] According to the Plaintiff, it was agreed that the Second Defendant will be the insured and she, the Plaintiff, will be the beneficiary. The Plaintiff would pay the premiums in respect of the policy or policies taken out. The Second Defendant would also sign a cession of the policies to the Plaintiff. The cession was so that no changes to the policies are made without her, the Plaintiff's,

knowledge. In order to ensure that the Plaintiff, at all times, knows what goes on in respect of the policies, everything in relation to the policies would be sent to the Plaintiff's postal address. The Plaintiff testified that the Second Defendant had no qualms about these terms.

[23] The Plaintiff arranged that Mr. Hariparsad travel to Johannesburg in order to complete a proposal for life policies with the Second

Defendant. Mr. Hariparsad advised the Plaintiff that proposals for life policies is to be sent to the Third and Fourth Defendants in order to see what is offered by the respective insurance companies. Mr. Hariparsad travelled to Johannesburg, met with the Plaintiff at her chambers in Sandton and they then travelled together to the home of the Second Defendant. The proposals were explained to the second defendant, by Mr. Hariparsad, including the effect of the intended cessions, which cessions could only be affected after the policies had been issued. The Second Defendant, satisfied with the explanation provided to her, signed the proposals, on the strength of which the two 2006-policies were eventually issued.

[24] In 2008, the Plaintiff was contacted by Mr. Hariparsad who indicated that Old Mutual has an offer for existing clients and a further

policy can be obtained over the life of the Second Defendant. The offer was discussed by the Plaintiff with the First and Second Defendant and the same terms was agreed to as per the two 2006-policies. The Plaintiff again arranged for Mr. Hariparsad

to travel to Johannesburg, with the same process followed as before. The second Old Mutual policy was issued as a result.

- [25] Each of the premiums for the respective policies paid via the Plaintiff's banking account by way of monthly debit order. The Plaintiff also received the original policies via post. At the time of receiving the first Old Mutual policy, the Plaintiff noticed the policy incorrectly reflected the Second Defendant as be beneficiary. Mr. Hariparsad undertook to have the error corrected and the Plaintiff decided to wait with the cessions until such time that the correct first Old Mutual policy was at hand. According to the Plaintiff this corrected first Old Mutual policy has still not been received.
- [26] During April 2009 an incident occurred whereby a letter was received from Liberty, changing the address from that of the Plaintiff to that of the Second Defendant. There were denials all round from the First and Second Defendant that the Second Defendant had attended a change of address in respect of the Liberty policy. The Plaintiff decided that in order to prevent changes from being made, it is time to take the cessions. She contacted Mr. Hariparsad, who sent her a telefax with the cession form of the Third Defendant. In support of this, the plaintiff referred to the cession form that reflected the telefax receipt line of April 2009. However, as the crisis with the change of address had been averted, the cession form was the plaintiff left the cession form unattended to on her desk until September 2009 when she filled it out.
- [27] The Plaintiff handed the completed form to the First Defendant, who was on his way to visit the Second Defendant, with the children, at the Second Defendant's home. The Plaintiff requested the First Defendant to have the cession signed, showed him where the Second Defendant must sign the cession and to obtain a copy of the Second Defendant's identity document. The Plaintiff also provided the First Defendant with a letter, handwritten by the Plaintiff, relating to which addresses and contact details must be used in respect of the Liberty policy. The details contained in the letter included the plaintiff's physical address and email address, together with her cellular telephone number. The plaintiff required no more of the second defendant than to sign the letter. The Plaintiff, at this juncture in time, also wanted to download the cession form in respect of Old Mutual, however the First Defendant did not want to wait as he and the children were already packed and ready to leave for their visit to the second defendant.
- [28] When the First Defendant returned home after visiting the Second Defendant, he handed the Plaintiff the cession form from Liberty, the handwritten letter, both signed by the second defendant, together with a copy of the Second Defendant's pre-1996 identity document. The Plaintiff made copies of the documents, including some 10 copies of the Second Defendant's identity document

copy. The Plaintiff was of the view that she would hand in the cession at the offices of Liberty as it is on the way to court, which she frequently attends. Until 2015, the Plaintiff did not hand in the cession at the offices of Liberty.

- [29] Nothing in the Plaintiff's case turns on the delay in respect of submitting the cession to Liberty. The Plaintiff explained in broad detail, due to the busy nature of her, as she termed it, successful practice and frequent sojourns abroad that she did not attend to the registration of the cession with Liberty. I do not propose to deal in any detail with the timeline of events in this regard as the evidence of the Plaintiff was logical, chronological and, most tellingly, uncontested by the defendants.
- [30] The Plaintiff further testified to matters that were either a common course or was not seriously disputed by the First, Second and Fifth defendants. In brief, the Plaintiff confirmed that she happened to realise during 2015 that she had been removed as beneficiary to the policies. She indicated that she did not realise that the premiums for the policies were no longer going off her account. This is due to the fact that she had various policies with Liberty and Old Mutual which were debited on a monthly basis from her bank account. She was frank about the fact that she did not attempt to correlate the debits against her bank account with any particular policy.
- [31] I am of the view that there is nothing untoward or sinister about that the fact that the Plaintiff did not attempt to cause the registration of the cession with Liberty prior to 2015 and I hold the same view in respect of her failure to realise earlier that she had been removed as the beneficiary of the policies. I interpose to mention that the registration of the cession with Liberty is an internal requirement of Liberty in order to ensure that Liberty is aware of the existence of the cession, and the legal validity of the cession itself was not attacked any basis pertaining to the delay in the registration of the cession, including that the cession had lapsed as a result of the aforesaid delay.
- [32] The cross examination of the plaintiff is more properly measured and considered by that which had not been put to the Plaintiff by the First, Second and Fifth defendants' Counsel, rather than what had been put to the Plaintiff. The Plaintiff remained resolute in her evidence, although she at times attempted to argue her case from the witness stand with the First, Second and Fifth Defendants' Counsel. It was necessary for the court, on more than one occasion, to reign in Plaintiff and remind her that she is a witness, not Counsel and that she should answer questions rather than argue the probabilities of the matter from the witness stand.
- [33] Pertinent to the plaintiff's evidence, however, is the fact that certain aspects which were vaguely pleaded and testified to at a later juncture by the first and second defendants, were not put to the plaintiff for her comment. The aspects that were not put to the plaintiff were, in my view, material and should have been put to the plaintiff for her comment. The most pertinent examples are:

30.1 In paragraph 12.1 of the First, Second and Third Defendants' Plea to the Plaintiff's Amended Particulars of Claim, two persons purporting to be from Liberty, allegedly arrived at the Second Defendant's school during 2009 in order to have the cession document signed on the pretext that it is merely a change of address that is being affected. The Plaintiff's evidence relating to how the cession document was signed was not challenged under cross-examination with this version. Even more importantly, it was not put to the Plaintiff that these persons were acting on behalf of, or on the instructions of, or as the agents of, or in common purpose with the Plaintiff to misrepresent the true nature of the document which the Second Defendant was required to sign. Despite this version not being put to the plaintiff, the second defendant was, during her testimony, led on this issue.

30.2 The Plaintiff's version relating to how the cession document and accompanying handwritten letter was signed by the Second Defendant was not challenged. In similar vein, no version was proffered how the Plaintiff came to be in possession of the Second Defendant's pre-1996 identity document. It was merely put to the Plaintiff that during 1996 the Second Defendant obtained a new identity document and no longer used the pre-1996 identity document. In this regard the plaintiff was referred to a copy of the second defendant's 1996-issued identity document. The Plaintiff ventured an educated guess that the Second Defendant may only have been in possession of copies of her pre-1996 identity document and that is the reason why the pre-1996 identity document copy was provided to the Plaintiff. Even this educated guess was not placed in issue.

30.3 No version was put to the Plaintiff on how it came about that Mr Harripersad, the originating broker for the policies and the Plaintiff's family member, became involved in the obtaining of proposals for life policies that were the alleged brainchild of the First and Fifth Defendants. Against the background of the evidence on behalf of the defendants that the broker attended the home of the Second Defendant in the absence of the Plaintiff, this is an important aspect that should have been put to the Plaintiff for her comment.

[34] By way of questions put to the plaintiff by this court, the Plaintiff confirmed that at the time the policies were taken out over the life of the Second Defendant, the Fifth Defendant, who is 14- years younger than the First Defendant, had no children and was not even involved in a relationship. She also confirmed that she paid the premiums to the policies to the exclusion of the first and fifth defendants. For greater clarity the plaintiff was solely liable for the payment of the premiums to the policies and no contributions to the premiums were made or tendered by the First and/or Fifth Defendants. This concluded the evidence for the Plaintiff.

The Second Defendant's Evidence

[35] The Second Defendant testified first on behalf of the First, Second and Fifth Defendants. She testified as to the existence of an agreement between herself, the First and Fifth Defendants. According to her, the first and fifth defendants discussed the issue of taking out life policies

on her life with her. It was only after the first defendant discussed the matter with the plaintiff, that the second defendant was informed that the plaintiff, in order to accept liability for the premiums, insisted on being the beneficiary. This evidence of an insistence on the part of the plaintiff to be the beneficiary is at material variance to the pleaded version of the defendants. It will be recalled that the defendants pleaded that the terms of the first oral agreement, as between the first, second and fifth defendants, was that the plaintiff will be the beneficiary to the policies. The evidence was that the plaintiff being the beneficiary came at the insistence of the plaintiff.

[36] In addition to the aforesaid, the Second Defendant testified that during 2009 two representatives of Liberty arrived at her school and required her to sign documentation for change of address purposes. This is the evidence relating to the pleaded version referred to above where the defendants failed to plead when and where these events took place. According to the second defendant, these representatives of Liberty did not want to leave the forms with her and required her to sign the documentation then and there. As she was not allowed visitors at school she required them to proceed to the personnel room where, after giving the children in her classroom work to do, she went to meet them. They persisted that she need not read the cession document, which was in any event not completed according to the Second Defendant. The Second Defendant testified that they did not provide her with an opportunity

to read the documents and she was merely required to sign the documents in their possession. The documents that are referred

to is the cession form of Liberty and the previously mentioned handwritten letter. According to the Second Defendant, despite

the word “cession” appearing in bold and capital letters on the cession form and thus easily discernible, she did not notice the word “cession”. Also, despite the the letter, having been marked with the letters “NB” at the change of address, she did not notice what she is required to sign. Her evidence was simply, she was under pressure, as a result she did not read it and merely signed it.

[37] Tellingly, the Second Defendant did not give evidence to the effect that the two persons who arrived at her school was there at the behest of the Plaintiff. No evidence was advanced by the Second Defendant that she recognised the handwriting on the letter as being that of the Plaintiff. Naturally she could not give such evidence as it would have led to the conclusion that she must have read the documents. The evidence of the Second Defendant remained that the two representatives were the representatives of Liberty. The lack of evidence to link the alleged representatives of Liberty to the plaintiff, is fatal to the defendant’s misrepresentation claim.

[38] At best for the Defendants, they seek to rely on the drawing of an inference that the uncompleted document signed by the Second

Defendant is the completed document that the Plaintiff submitted to Liberty. I must point out that such an argument was not

advanced when I pressed Counsel on how am I to draw a causal link between the alleged document signed, the alleged two representatives

of Liberty and the Plaintiff. Even no argument in this regard was advanced, I will still consider the issue and determine whether it would be proper to draw such an inference.

- [39] Inferences can only be drawn from objectively established facts.[5] On what basis the second defendant can state that the incomplete cession form she signed is the cession form that was submitted to Liberty remains a mystery. She did not read the document. Save for pre-printed lettering on a monotonous type, there were no identifying marks on the cession form that could lead her to reasonably believe the document she signed is one and the same document that was presented to Liberty. One must also remember, a period of more than 5-years elapsed between when the second defendant allegedly signed the incomplete cession document and when a completed cession document was submitted to Liberty.
- [40] In the absence of being able to demonstrate that the document allegedly signed in 2009 is the same document submitted to Liberty in 2015, the Defendants can do no more than present the court with speculation that the two persons who approached the second defendant acted on the instructions of the plaintiff. There are no proved facts, from the Defendants' side, which can give rise to the drawing of an inference. The Defendants' version leads to speculation and conjecture. The Defendants' version does not even allow for the drawing of an inference, never mind the drawing of an inference that is consistent with their version.[6]
- [41] The seconded defendant also testified that the reason why the Plaintiff was to pay the premiums to the policies were due to the fact that the First Defendant was, at that stage unemployed. The Second Defendant did not testify that the First Defendant would undertake liability for the premiums, as pleaded by the defendants. The second defendant also did not testify that the first defendant indicated that the plaintiff would be liable for the premiums due to the alleged spousal agreement. No evidence was led whereby liability for the premiums would be financial liability of the first defendant. Her evidence was that the Plaintiff would pay the premiums in terms of that which she, the first and fifth defendants agreed.
- [42] In so testifying, the Second Defendant undid the spousal agreement that was pleaded by the First, Second and Fifth Defendants. The undoing is so because no spousal agreement would be necessary if the Plaintiff undertook to pay the premiums of the policy.
- [43] The Second Defendant further testified that the reason why she, the first and fifth Defendants, were amenable to the Plaintiff being the beneficiary of the policies is that she expected the Plaintiff to do the right thing upon her demise and ensure the distribution of the proceeds of the policies to the First and Fifth Defendants, as well as then living

grandchildren. Rather peculiarly, the Second Defendant also testified that the relationship between herself and the Plaintiff was not a good one; that the Plaintiff did not treat the Second Defendant right; and that the Plaintiff withheld her grandchildren from both herself, as grandmother, and the first defendant, as their father. On what basis the Second Defendant was of the view that she could trust the Plaintiff to do the right thing under such circumstances, remains unexplained.

[44] Moreover, the Second Defendant does not explain why the First, Second and Fifth Defendants agreed, in terms of the alleged first oral agreement, to appoint the Plaintiff as beneficiary in respect of the policies. On the pleadings, this agreement between the First, Second and Fifth Defendants was reached before the life cover was mooted to the Plaintiff. In any event, the evidence led by the Defendants was that the Plaintiff agreed to pay the premiums for the policies at the insistence that she be the nominated beneficiary. This evidence is at variance with the pleaded averments.

[45] The second defendant also testified that the broker attended her home, to the exclusion of the Plaintiff. It is common cause that the broker is Mr Hariparsad. No version was provided by the Second Defendant how it came about that Mr Harripersad, a family member of the plaintiff, came to attend her residence from Newcastle. Again, the Plaintiff's version relating to Mr Hariparsad's version was not challenged. There is no explanation for this failure.

[46] The second defendant could also not explain how the original policies ended up in the hands of the Plaintiff and there was no version from the Second Defendant how the policies, if they had been sent to the Second Defendant, ended up in the possession of the Plaintiff.

It was also not put to the plaintiff during cross examination that the original policies were in fact sent to the Second Defendant.

[47] The Second Defendant also testified that the pre-1996 identity document copy which the Plaintiff utilised when submitting the cession to the Third Defendant had not been in use by her since she acquired her new identity document during the course of 1996. No version was offered how the Plaintiff came to be in possession of the pre-1996 identity document copy.

[48] The Second Defendant confirmed that the motive for removing the Plaintiff as the sole beneficiary of the policies and replacing her with the First and Fifth Defendants, was the fact that she was no longer a member of the Kathawaroo-family.

[49] In the end, the Second Defendant's evidence did not advance the case of the First, Second and Third Defendants. To the

contrary, it gave rise to inherent improbabilities being exposed in their version.

The First Defendant's Evidence

[50] The First Defendant cut a forlorn figure in the witness stand. His evidence was characterised by assertions of he "cannot

remember” or a qualification of “if I recollect”, all on critical points necessary to defeat the Plaintiff’s

evidence. No doubt, the “if I recollect” was an escape avenue the first defendant left open to himself, lest he be tripped up during cross-examination as being untruthful or contradictions being exposed.

- [51] The First Defendant’s reliance on the pleaded spousal agreement to establish the rationale for the Plaintiff paying the premiums to the policies were ill-fated from the start. As already indicated, the First, Second and Fifth Defendants pleaded that the Plaintiff would be responsible for “all the needs of the common household and all the financial obligations of the first defendant. . . .” The policies does not constitute the “needs of the common household”, as such the payment of the policies had to be covered by “all the financial obligations of the first defendant.”
- [52] The policies are owned by the Second Defendant. The payment of the premiums is the responsibility of the Second Defendant. The payment of the premiums of the policies thus did not constitute a financial obligation of the first defendant. Moreover, it was not put to the Plaintiff that the spousal agreement in respect of the First Defendant’s financial obligations is so wide that it would include financial obligations the First Defendant gratuitously undertook. Also tellingly, the Plaintiff testified that the First Defendant paid for his personal expenses from his salary where he could afford it. By implication she paid for his personal expenses where he could not afford it. It would be an undue stretching personal expenses to include expenses he gratuitously undertook and which are, in effect, not personal in nature.
- [53] The First Defendant could also not explain why the cession, as presented to Liberty during 2015 by the Plaintiff, was not attacked or impugned, by the First Defendant to Liberty, on the basis that when it was signed, it was signed as a mere change of address document and not in order to affect a cession. The attack by the First Defendant, in communications with Liberty, centred around the fact that the cession document contained errors, such as for example the Second Defendant’s name and the Plaintiff’s identity number was incorrectly recorded.
- [54] When the first defendant was pressed thereon that he did not inform Liberty about the alleged misrepresentation, he initially had no answer. When he was further pressed on the same issue as well as the fact that the version testified to differs from the pleaded version and that pertinent issues now testified to was not put the Plaintiff for comment during cross-examination, he withdrew into a meek witness and would either state that he does not know, he cannot remember or, as a matter of last resort, that he should be viewed as a lay person as he is not a very successful or good advocate in private practice.
- [55] His assertions that he cannot remember cannot hold true. The First Defendant have been intricately involved in obtaining of the policies and this matter by and large, from the outset. As a matter of fact, from his evidence, he is the eldest son of the second defendant and has, since the passing of his father, taken the role of the paterfamilias of the Kathwaroo-family.

He is also the person who acted as the intermediary, between the first and fifth defendants and the plaintiff as well as the go-between as between the second defendant and Liberty as well as Old Mutual. He is the person who drafted various communications on behalf of the second defendant.

- [56] An apt example of the First Defendant not being able to recall is found in comparing the evidence of the Second Defendant on the 2009-signing of the cession as a change of address as against that of the First Defendant. According to the Second Defendant she informed the First Defendant of the representatives Liberty having arrived at her school and requiring her to sign documentation to effect a change of address. The First Defendant could not recall if the Second Defendant had told him. He can also not recall if he contacted Liberty to make enquiries about the incident in so far as the Second Defendant had told him of the events. Taking into consideration that such actions, if it occurred and if it was at the behest of the Plaintiff, would have constituted a repudiation of the agreement relied upon by the First, Second and Fifth Defendants, it is an event that would remain in one's mind.
- [57] In so far as his allegations relating to legal competency is concerned, I cannot find that the First Defendant should be dealt with as a lay person. The principles of law applicable, namely that one's pleadings constitutes the issues between the parties and gives rise to the evidence that is to be led between parties; that one may provide instructions to your Counsel during the course of a trial on facts that were not consulted on; that issues testified to by a witness which is placed in dispute should be brought to the attention of a witness; that the version relied upon, at variance with what the witness has testified to, should be put to such witness, are all trite principles of law. These aforesaid principles are not complex, nor little known intricacies of law. I must interpose here to point out that whilst the Plaintiff was testifying, both the First and Second Defendants were present in court at all times. Any aspect that arose from the Plaintiff's evidence that was not consulted on, if it was not consulted on, could have been brought to the attention of the Defendant's Counsel and instructions provided.
- [58] The Fifth Defendant did not testify. He was available to testify, however as his evidence would merely have been to confirm the agreement between the First, Second and Fifth Defendants, Counsel for the Plaintiff correctly indicated that he will make no issue thereof if the Fifth Defendant is not called as a witness.

The Analysis of the Case Overall

- [59] I have already dealt with a partial analysis of the evidence presented in summarising the evidence presented. Such analysis must be seen as part and partial of the analysis of the case overall.
- [60] Despite the argumentative and repetitive imperfections in the Plaintiff's evidence, the plaintiff's evidence was logical, coherent and had a distinct ring of truth to it. She was frank and honest, even on aspects that could be harmful to her case.

[61] The First Defendant's evidence did very little to establish the agreement as pleaded by the First, Second and Third Defendants.

As was pointed out during the cross-examination of the First Defendant, the evidence by the First Defendant served to confirm in

material respects the version of the Plaintiff, namely the taking out of life policies on the life of the second defendant and the plaintiff being the sole beneficiary who would be responsible for payment of the premiums in respect thereto.

[62] A material aspect not touched upon by the First, Second and Fifth Defendants, which would have assisted lending credence to their

version, is an explanation why the Plaintiff would have agreed to be solely liable for the premiums to the life policies without either her or the children being the sole beneficiary/ies to the policies. Otherwise queried, why would the Plaintiff pay the full premiums, without contribution from the First and/or the Fifth Defendants for an unknown period of time and then have to share the proceeds of the policies with persons who did not contribute towards the policies' premiums. There is, at the very least, no explanation by the First, Second and Fifth Defendants what would occur with the premiums, or at least a part thereof, that had been paid by the Plaintiff in the event of her being removed from the policies as beneficiary. In other words, would the First and Fifth Defendants benefit solely from the policies in respect of which the Plaintiff had paid the premiums without their assistance.

[63] The First, Second and Fifth Defendants also failed to explain why they did not inform the Plaintiff that, as per the agreement they contend for, the Plaintiff is being removed from the policies as she is no longer a member of the Kathwaroo-family. The removal of the plaintiff as beneficiary was done in a underhanded manner. One would have expected that if the agreement is, as was contended for by the First, Second and Fifth Defendants, there would have been no risk for them to inform the Plaintiff that they are enforcing the terms of the agreement.

[64] The evidence of the First and Second Defendants did not, corroborate one another on aspects where their respective testimonies overlapped.

[65] The evidence presented by the First and Second Defendants were materially at variance to the pleaded case in which they set out the issues to be dealt with by the parties and to be determined by this court. This brings me to a potentially problematic issue that arises due to the failure of the First, Second and Fifth Defendants from putting material aspects of their case to the Plaintiff for comment. It is trite law that if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct.[7] This rule of practice is followed to ensure that trials are conducted fairly. This means that witnesses are afforded the opportunity to answer challenges to their evidence and that all parties to the particular action knows that it may be necessary to lead corroborating evidence relating to the

challenge that has been raised.[8]

[66] I was invited by Counsel for the Plaintiff to rule as inadmissible any evidence that was led and disregard any submissions that was made thereon in respect of matters not placed in dispute through cross-examination. In this regard he relied upon the address of the Honourable Justice Rolfe of the New South Wales Supreme Court.[9] In the article, Justice Rolfe refers to the matter of Pay Less Superbarn (NSW) Pty Ltd v O’Gara,[10]where Cloete JA stated “Obviously breaches of the rule may occur in many different circumstances and it would be quite inappropriate for the courts to endeavour to lay down a specific procedure to remedy the problems flowing from a breach no matter in what circumstances the breach occurs. Different situations will call for different remedies and in my opinion the precise procedures to be adopted when a breach of the rule occurs lies within the discretion of the trial Judge. It is for him to determine whether a breach has occurred and, if so, what steps should be taken to ensure that the trial does not miscarry. . . “

[67] Justice Rolfe went further later in the article and proposed that the trial Judge must “decide whether the matter has been put fairly and squarely in issue and put to the witness, such that the dictates of fairness have been accommodated.” He opines that if the answer is negative and there has been no application by the party in the wrong to conduct further

cross-examination, then the solution is that the evidence to the contrary should not be admitted and submissions contradicting the uncontradicted evidence should not be accepted.

[68] I propose to adopt a different approach in this particular matter. I consider it apt to have regard to the evidence presented on behalf of the First, Second and Fifth Defendants and then to reject such evidence outright as fanciful, contrived and improbable. It boggles the mind to attempt to fathom on what basis the First, Second and Fifth Defendants thought that their version why the Plaintiff undertook liability for the payment of the premiums of the policies would ever muster scrutiny. The version of the First, Second and Fifth Defendants have the effect of the First Defendant gratuitously undertaking financial obligations on behalf of all and sundry and the Plaintiff must merely foot the bill therefor. This is so implausible that it can be rejected outright.

[69] Also, to suggest that the Plaintiff would undertake full monthly liability for an undeterminable period of time with only a portion of the benefit accruing to the children in due course makes sense, financial or otherwise. In essence, the First, Second and Fifth Defendants contend for a situation whereby the First and Fifth Defendants would benefit a substantial sum of money without them contributing to the sustaining of such a benefit. This absurdity can be stretched further. Once the Fifth Defendant

has children, the benefit that the children would receive would diminish in proportion to that number of children. This means

that despite the Plaintiff continuing to foot the monthly premiums, the benefit to the children would deplete in proportion to the number of children the Fifth Defendant has, all whilst the Fifth Defendant is not required to make a contribution towards the premiums in respect of the policies from which he and his children stand to benefit.

[70] In respect of the cession-issue, the version of the First, Second and Fifth Defendants were palpably contrived. They were faced with a double-edged sword. If the Second Defendant read the documents, she would immediately realise she is ceding all the rights and benefits of the policy with Liberty to the Plaintiff. So in order to avoid such state of affairs, the version that she did not read the cession document, or the change of address letter, was arrived at. However, as she did not read the change of address letter, she would not have paid particular attention to the handwriting and would not have connected the Plaintiff to the two persons. As the evidence shows, the Second Defendant made no such connection. This has the effect of the First, Second and Third Defendants being left unable to create a causal connection between the alleged misrepresentation by the unknown persons and the Plaintiff. The version proffered, which on the face of it seems possible, does not withstand scrutiny.

[71] Even if I am wrong in the aforesaid approach regarding the evidence on behalf of the Defendants, it matters not. Approaching the matter on the probabilities of the differing versions, the version of the Plaintiff is inherently more probable than the version of the Defendants. The same reasoning that applies to the rejection of the Defendants' version, applies to the determination of the probabilities between the two versions.[11]

[72] In my view the Plaintiff has succeeded in proving the terms of the agreement upon which she relies, namely

64.1 Life insurance policies would be taken out on the life of the Second Defendant.

64.2 The Plaintiff will be the sole beneficiary of the policies, which benefit is to be utilised for the children born of the marriage between herself and the First Defendant.

64.3 The Plaintiff would be responsible for the premiums in respect of each policy so taken out.

64.4 No changes, including beneficiary changes, will be made to the policies unless so agreed on by, inter alia, the Plaintiff and the First Defendant.

[73] Further in my view, the Plaintiff has established the existence of a valid cession, being the cession dated 17 September 2009.

Can the cession be registered

- [74] It is submitted on behalf of the First, Second and Third Defendants that the cession cannot be registered by the Third Defendant as its terms and conditions provide that “where a cession has been recorded, the Life Cover Benefit will be paid to the cessionary, or in the case of an absolute cession, to any Beneficiary nominated by the cessionary as Owner.” In my view this submission is misplaced.
- [75] The relief sought by the Plaintiff is that the Third Defendant is to take all steps necessary in order to record the cession of the policy with the Third Defendant from the Second Defendant to the Plaintiff. The use of the words “take all steps necessary” is instructive. As the cession is valid, the internal requirements of the Third Defendant to cause the cession to be registered cannot affect the legal validity of the cession. As such, if there is any internal requirement constituting an impediment to the registration of the cession by the Third Defendant, the wording of the relief sought by way of “take all steps necessary” is wide enough, in my view, for the Third Defendant to require the Plaintiff to comply with the necessary internal requirements so that the cession can be registered by the Third Defendant.

The costs

- [76] Costs remain a discretionary issue. However, there are no grounds upon which I can find that the usual order relating to costs, namely that costs follow the suit, should not be granted.
- [77] This brings me to the issue of the reserved costs for the set down date of 9 June 2020, when the trial did not proceed. I was presented by a letter from the First, Second and Fifth Defendants’ attorneys dated 10 June 2020, setting out a chronology of events pertaining to the postponement of the matter. I was also referred to the pre-trial minute of 4 June 2020 pertaining to certain additional facts not contained in the aforesaid letter. I do not intend to traverse the issues arising from the aforesaid documents and determine which party is more at fault than the other. It suffices to state that the matter, due to the conduct of both parties, was not ripe for trial on 9 June 2020 and would not have proceeded in any event. The most appropriate order in respect of the reserved costs is that each party is to pay their own costs in this respect.
- [78] In the premises, I make the following order:
1. The Second Defendant is ordered to restore the Plaintiff as the sole beneficiary on the:
 - 1.1 Old Mutual Policy, which commenced with policy number 014898212 on 6 October 2006;
 - 1.2 Liberty Life Policy, which commenced with policy number 58927820000 on 1 December 2006;and
 - 1.3 Old Mutual Policy, which commenced with policy number 015445003 on 2 July 2008,(“the policies”).

2. The Second Defendant is ordered to take any and all necessary steps to give effect to the order in paragraph 1 of this order, within 7 (SEVEN) days of the granting of this order and to provide written proof to the Plaintiff's attorneys that such steps have been taken, failing which the Sheriff of this Court is hereby authorised to do all things necessary, including the signing and submitting of documentation required by the Third and/or Fourth Defendants, in order to give effect to the order in paragraph 1 of this order.
3. The Plaintiff is ordered to resume payment of the monthly premiums in respect of the policies.
4. The Third Defendant is ordered to take all necessary steps in order to record the Cession of the policy referred to in paragraph 1.2 of this order from the Second Defendant to the Plaintiff.
5. The First, Second and Fifth Defendants are ordered to pay the costs of the action, jointly and severally the one paying the other being absolved, save for the reserved costs occasioned by the postponement of the trial of 9 June 2020. Each party shall be liable for their own costs in respect of the reserved costs.

C.THOMPSON

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing

: 7 February 2022

Date of judgment

: 2 March 2022

APPEARANCES

On behalf of The Plaintiff : Adv E.L.Theron SC

Instructed by

: Borman Duma Zitha Attorneys

On behalf of The Respondents : Adv A Lapan

Instructed by

: Moodiyar & Bedhesi Attorneys

- [1] The children are defined in paragraph 9 of the Plaintiff's Particulars of Claim, which is admitted by the Defendants. The children referred to are the minor children of the Plaintiff and the First Defendant.
- [2] *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (AD) at para [32] "At the outset it needs hardly be stressed that: The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed." (*Durban v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082.) This fundamental principle is similarly stressed in *Odgers' Principles of Pleadings and Practice in Civil Actions* in the High Court of Justice 22nd ed at 113: "The object of pleading is to ascertain definitely what is the question at issue between the parties, and this object can only be attained when each party states his case with precision".
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- [3] See *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198 "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for the pleadings. And where a party has had every facility to palce the fact before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleadings of the opponent has not been as explicit as it might have been."
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- [4] *Lethimvula Health Care (Pty) Ltd v Private Label Promotion (Pty) Ltd* 2012 (3) SA 143 (GSJ) at para [8] "The introduction of a counterclaim subsequent to the delivery of a plea, where as in this case, the plaintiff has refused to consent thereto, requires the leave of the court. In this regard rule 24(1) provides: 'A defendant who counterclaims shall, together with his plea, deliver a counterclaim setting out the material facts thereof in accordance with rules 18 and

20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage... (See, as to the history of this sub-rule: *Shell SA Marketing (Pty) Ltd v Wasserman t/a Wasserman Transport* 2009

- (5) SA 212 (O) para [12] - [17]). It is necessary to consider what the criteria are in an application for relief under rule 24(1). First, there must be a reasonable and acceptable explanation for the lateness. . . Secondly, the defendant must show an entitlement to institute a counterclaim. . .”

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- [5] *Caswell v Powell Duffryn Associated Collieries Ltd* [1939 3 All ER 722 (HL) at 733E – F
“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable certainty. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

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- [6] Skilya Property Investments (Pty) Ltd v Lloyds of London 2002 (3) SA 765 (T) at 781A – B
“. . .the inference sought to be drawn must comply with the first rule of logic stated in R v De Blom 1939 AD 188 at 202 – 3: “(1). The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.”
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- [7] President of the Republic of South Africa & Others v SARFU & Others 2000 (1) SA 1 (CC) at paras [61] to [63] “[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.
- [62] The rule in Browne v Dunn is not merely one of professional practice but is essential to fair play and fair dealing with witnesses. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.
- [63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.”
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- [8] *S v Boesak*
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- [9] Australian Construction Law Newsletter, Issue 29, page 8
- [10]
- (1990) 19 NSWLR 551
- [11] See generally *African Eagle Life Assurance Co Limited v Cainer* 1980 (2) SA 234 (W) at 237B – 238B “Mr Gordon, on behalf of the defendant, has contended that once this sharp dispute concerning the existence of clause 9 has to be resolved it cannot be said that the plaintiff has discharged the onus of proof resting upon him, unless I am satisfied that plaintiff's witnesses speak the truth and defendant's evidence is false. He has referred me to a judgment which I gave in the matter of *Koster Koöperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* 1974

- (4) SA 420 (W) at 425, in which I dealt with the approach of WESSELS JA in the case of National Employers Mutual General Insurance Association v Gany 1931 AD 187 where the learned Judge said: 'Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version...' And, where I said at the foot of that page: "Ek ag my verbonde aan die uitspraak in die Gany- saak. Afgesien daarvan dat die Appèlhof nog nooit sedertdien met hierdie benadering weg gedoen het nie, wat nie sonder betekenis is nie, sou ek my graag respekvol met die onderliggende logika daaraan wil vereenselwig, en 'n paar opmerkings oor die verband daartussen en welbekende bewysmaatstawwe waag." In quite a few cases which I have heard since the Koster Koöperatiewe Landboumaatskappy case this portion of my judgment has been quoted to me out of context. At 426 I had hoped to make it clear what I thought what WESSELS JA meant, and something which does not seem to have been sufficiently clearly stated (judging by the frequency with which this further

portion of the judgment is not quoted) is that this approach to problems of proof in this type of case only applies

in cases where there are no probabilities one way or the other. Where there are probabilities, inherent or otherwise, there is no room for this approach. On the other hand, where there are no probabilities - where, for instance, the *factum probandum* was

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the Gany case does not apply to civil cases because of the omission of the learned Judge to have regard to the measure of proof in civil cases being on a balance of probabilities. But this criticism is invalid because, unless suitably qualified, it confuses proof with the measure of proof. Where there is no probability there is simply no proof of anything (regardless of the measure by which you measure it) unless you believe one person and disbelieve the other. Until then the chances of it being black or white remain exactly evenly balanced. This is simple logic. In this case, however, the matter does not fall into the category of the mutually destructive versions type of case to which the Gany dicta apply at all. I have indicated that there is much in the way of inherent probabilities, much in the way of surrounding circumstances which create strong probabilities. Once there are these probabilities, they have to be weighed up to determine whether plaintiff has

discharged its onus and there is no room for the application of whatever I said in the Koster case.”

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Prepared on 9 October 2026 · Esheria