

SOUTH AFRICA / JUDGMENT

I.L.L v L.V.H and Others (1889/2022)

[2024] ZAECQBHC 7 (1 February 2024)

[2024] ZAECQBHC 7**COURT**

Eastern Cape High Court, Gqeberha

BEFORE

Gqamana

CASE / FILE NUMBER

1889/2022

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****(EASTERN CAPE****DIVISION, GQEBERHA)****CASE****NO.: 1889/2022****In**

the matter between:

I[...]
L[...] L[...]
Applicant
and
L[...]
V[...] H[...]
First
Respondent
S[...]
A[...] V[...] H[...]
Second
Respondent
SPROINK
(PTY) LTD
Third

Respondent
FIRST
NATIONAL BANK
Fourth
Respondent
OLD
MUTUAL LIMITED
Fifth
Respondent

JUDGMENT

GQAMANA J

- [1] This is a typical matter that could and should have been resolved through mediation. This is a family dispute between the mother, her daughter, and her son-in-law, the applicant, the first and second respondents, respectively, about the return of the applicant's identity Document, passport and bank card ("the documents"). The third respondent is a company, of which the first and second respondents are directors. The fourth respondent is First National Bank, a division of First Rand Bank. The applicant holds a bank account with FNB. The fifth respondent is Old Mutual Limited. The third, fourth and fifth respondents did not participate in this application. The application is opposed by the first and second respondents.
- [2] The matter has a long and acrimonious history. It started as an extremely urgent ex parte anti-dissipation application wherein the applicant sought a rule nisi, that the first to third respondents' bank accounts be frozen and the funds therein be preserved pending an investigation as to where the applicant's funds were transferred by the first to third respondents and, that the first and second respondents be ordered to immediately return the applicant's documents.
- [3] A rule nisi was issued by this Court on 8 July 2022, calling upon the first to fourth respondents to show cause on 16 August 2022, why the interim anti-dissipation order should not be made final.
- [4] As part of the interim order, the fourth respondent, FNB was ordered to furnish to the applicant and her attorneys records relating to the funds transferred to the applicant's bank held with FNB and to block any and all accounts to which such funds were transferred, if such accounts were held with FNB. Subsequent to compliance with such an order by FNB, the applicant discovered that a sum of R6 060 000.00 was transferred to Old Mutual. On the basis of that new information, a supplementary application was issued to join Old Mutual as the fifth respondent and for a leave that the latter be included in the rule nisi and be ordered not to dissipate any of the funds held by it on behalf of the first to third respondents. Such an order was granted by this Court on 19 July 2022.

- [5] On the eve of the return date, the first and second respondents filed an answering affidavit. In their affidavit it is admitted that they received an amount of R4.7 million from the applicant. But they contend that such money was used to purchase a home for the applicant and that, to avoid further disputes and transfer costs, there was an agreement with the applicant that the house would be registered in the third respondent's name. Furthermore, the first and second respondents tendered to pay back an amount of R6 million which was transferred to the fifth respondent, Old Mutual. However, the first and second respondents denied that they are in possession of the applicant's documents. The first respondent contends that the

relevant documents were handed over to the applicant by her personally in January 2022, when the applicant was admitted to Link

Nursing Home, (an assisted living facility) in Jeffreys Bay.

- [6] On the return date, the parties agreed to the following order:

"IT IS ORDERED BY AGREEMENT THAT

1. The First, Second and Third Respondents are ordered to do all things, pay all sums, fees and/or penalties, sign all documents and give the necessary authorisations to ensure that:
 - 1.1. The amount of R6 060 000.00, currently held in an investment account, namely the Linked Investment Plan with contract number: 1[...], held in the name of the First Respondent with the Fifth Respondents, be immediately paid to the Applicant's nominated Bank Account;
 - 1.2. The amount of R120 000.00, currently held in the First Respondent's Savings Account under Account Number: 6[...] with the Fourth Respondent, be immediately paid to the Applicant's nominated Bank Account.
2. The Fifth Respondent to immediately make payment of the sum of R6 060 000.00 to the Applicant, as envisaged in paragraph 1.1 above, and after such payment has been made, to release the Investment Account.
3. The Fourth Respondent to immediately make payment of the sum of R120 000.00 to the Applicant, as envisaged in paragraph 1.2 above, and after such payment has been made, to release any block on the First Respondent's Account. The Rule Nisi, in respect of paragraph 1.2 of the 8 July 2022 Order is duly confirmed.
4. Once payment has been authorised and effected in accordance with paragraphs 1 to 3 above, the issues subject to the Rule Nisi, only in respect of the Bank Accounts held with the Fourth Respondent (as per paragraphs 1.1 and 1.5 of the Order of 8 July 2022), as well as the issue subject to the Rule Nisi in respect of the Investment Account held within the Fifth Respondent (as per paragraph 2.2 of the Order of 19 July 2022), is discharged.

5. The discharge of the Rule as set out in paragraph 4 above is agreed to without any waiver and/or relaxation of the Applicant's rights and the Applicant's rights (including those rights related to the aspect of costs) remain reserved.
6. The Rule Nisi, in respect of the remainder of the issues, subject thereto, including, but not limited to, the issues as recorded in paragraphs 1.3, 1.6 (as amended by this order), 1.7 and 2 of the Order of 8 July 2022, is duly extended, and the application postponed to the opposed motion roll of 27 October 2022.
7. The First, Second and Third Respondents are interdicted and restrained from alienating, encumbering, selling and/or disposing of the immovable property situated at 2[...] S[...] ROAD, BEACHVIEW, GQEBERHA until such time as legal process, legal action and/or proceedings for payment, including such proceedings as envisaged in paragraphs 1.6 to 1.6.2 of the 8 July 2022 Order, is finalised, and the First, Second and Third Respondents shall ensure that a caveat be registered and/or lodged with the Deeds Office in this regard. The First to Third Respondents shall provide the Applicant's attorneys with proof of the registration of the caveat within 30 days from date hereof.
8. The First and Second Respondent and/or any shareholder of the Third Respondent is interdicted and restrained from selling, transferring, ceding, assigning, delegating or encumbering the shares held in the Third Respondent until finalization the legal process, legal action and/or proceedings for payment, including such proceedings as envisaged in paragraphs 1.6 to 1.6.2 of the 8 July 2022 Order.
9. The Applicant is to file a Replying Affidavit to the First, Second and Third Respondents' Answering Affidavit, served on 15 August 2022 on or before 30 August 2022 and all of the Applicant's rights remain reserved.
10. The Applicant is afforded until 30 September 2022 to institute legal process (including any application and/or action proceedings), as envisaged in paragraphs 7 and 8 above.
11. Costs of the application, including the costs related to the appearance on 16 August 2022, the urgent ex parte applications of 8 July 2022 and 19 July 2022, as well as all costs pertinent thereto, are reserved for final determination in the opposed application."
- [7] As a result of the above order, the only remaining issue was whether the applicant was entitled to a final order for the return of her documents and the costs. The matter was set down on the opposed roll before my colleague Potgieter J on 27 October 2022. On the latter date, the parties agreed to an order that the remaining issue be referred to oral evidence, and that the rule nisi be extended accordingly, and that all the costs thus far be determined after hearing oral evidence.
- [8] The crisp issue before me is whether the applicant is entitled to a final order for the return of her documents. The applicant's claim for such relief is based on rei vindicatio.
- [9] In a claim based on rei vindicatio, the plaintiff (the applicant in casu) must allege and prove:

9.1 ownership of the thing whether moveable or immovable.[1]

9.2 that the defendant was in possession of the property when the action was instituted.[2]

[10] It is common cause that the applicant is the owner of the documents in question. The lis is whether the first and/ or the second respondents were in possession of the documents when the application was instituted. As alluded in paragraph 5 above, the first and second respondents deny that they are in possession of such documents.

[11] To grasp and contextualise the issues herein that led to the institution of this application, I have to set out brief and succinct factual background. The applicant is an 83-years old person. She is the mother and mother-in-law of the first and second respondents, respectively. She and the first respondent's biological father divorced when the first respondent was relatively young. Later on, she nurtured a relationship with P[...] L [...], a British citizen, and they got married. She and Mr L[...] moved to the United Kingdom, where they lived together. The first respondent had no contact with her for about 35 years. It was around September 2019 that the first respondent had contact with the applicant on Facebook. From thereon, they exchanged messages, and during such conversations, the applicant informed the first respondent that her visa had expired and that her application for a spousal visa was refused. Further, the applicant was afraid that if she were to be deported it would be via Addis Abbaba, where she may be raped. Concerned about her mother's predicament, the first respondent suggested and agreed to assist the applicant with the deportation process.

[12] After some discussions, the applicant and first respondent agreed that her mother would undertake the Voluntary Return Process via the UK Home Office and return to South Africa. Her application was approved, and the Home Office made the necessary travel arrangements for her to return back to South Africa. She arrived in South Africa on 11 November 2019, accompanied by two carers who were appointed by the Home Office in UK. On her return to South Africa, she moved in and resided with the first and second respondents at their home in Jeffreys Bay.

[13] Shortly thereafter, on or about 13 November 2019, the first respondent and her daughter, Ms M[...] v[...] H[...] (M[...]) assisted the applicant in opening a bank account with FNB in Jeffreys Bay. The applicant's main living expenses were paid by the first and second respondents. I must also mention also that the first respondent had signing powers on the applicant's bank account.

[14] Later on, during February 2020, the first respondent again assisted the applicant in applying for a social grant at the South African Social Security Agency (SASSA). In April 2020, the applicant received an initial payment of her social grant in the amount of R3 804.00 and thereafter she received continuous monthly payment of R1800.00.

- [15] As a side issue, the applicant instructed a Solicitor from a Law firm in the UK called Expatriate Law to institute divorce proceedings. While the divorce process was pending, sadly, her husband died intestate, leaving the applicant with a lucrative inheritance. The monies received by the applicant as part of her inheritance were deposited into her FNB account. There is an allegation by the applicant that the first respondent withdrew without authority a sum of R9 120 000.00 from the aforementioned bank account.
- [16] Fast forward and zooming straight to the issue at hand, during December 2021, the applicant became ill and was diagnosed with a bleeding stomach ulcer, and it became cumbersome to take care of her. As a result, the first respondent arranged for her to be admitted to Link Nursing Home, a nursing facility in Jeffreys Bay at the beginning of 2022. The first respondent frequently visited her on a weekly basis while she was at Link until she left in July 2022, and this application was instituted.
- [17] It is against this factual background that the remaining issue in dispute must be decided. Because there were disputes of facts on the remaining issue that could not be properly decided on affidavits, my brother Potgieter J referred that issue to oral evidence in accordance with rule 6(5)(g) of the Uniform Rules of Court. In order to prove the applicant's case, two witnesses were called, namely Sister Amelia Coetzee and the applicant. On the other hand, the first and second respondent relied on the evidence of their daughter M[...], who was the only witness called in support of their defence. I deal with their evidence below.
- [18] On the applicant's evidence, her documents were inside her handbag in the wardrobe in her room at Link. The first respondent visited her towards the end of January 2022, and took the handbag with her documents inside. Since then, she has never seen her documents again. When this application was instituted, her documents were still with the first respondent because she never saw them again since the first respondent took her handbag. She made an attempt to obtain a new Identity document and a Passport at Home Affairs, but she was unsuccessful. She was informed by the officials at Home Affairs that she was no longer in their system due to the fact that she had been out of the country for too long. Under cross examination, she conceded that there is no allegation in her founding affidavit that, she saw the first respondent taking her handbag after the latter told her that she was instructed by the second respondent to take the handbag. In addition, the applicant made a fundamental concession that she could not say that her documents were in the second respondent's possession. That concession exonerates the second respondent from the relief that the applicant now seeks, namely the return of her documents. The applicant, however, maintained her version that her documents were taken by the first respondent and disputed the proposition put to her that her documents were in her handbag in March 2022 when her granddaughter M[...] visited her at Link.
- [19] Regarding the bank card, the applicant testified that although she managed to open a new bank account, but she is still unable to access the bank account relevant herein hence she needs her bank card. The applicant under cross- examination admitted that she had signed a

general power of attorney, giving the first respondent full power and authority to act and transact on her behalf and to manage her affairs. That concession confutes her testimony that the first respondent raided her bank account and withdrew money therein without her authority.

[20] Viewed objectively, the applicant's testimony was not without contradictions. For instance, her evidence painted the first respondent in an extremely bad light, as a person who "forced" her to sign some documents that were not explained to her, but in the end, that turned out not to be so. There are a couple of other allegations made by the applicant against the first respondent in her oral evidence which are not contained in her founding affidavit. It is on that score that I understand Mr Jooste's criticism of the applicant's evidence. However, in my view, the correct approach is to evaluate her evidence as a whole and not in piece meal.

[21] The second witness was Sister Coetzee.[3] Her evidence was that she never saw the applicant's original documents but only had sight of a copy of her ID, which was attached to the applicant's registration form. While the applicant was at Link facility, she had to book a doctor's

appointment for her and it was then that the original ID document was required. Because of that she had to contact the first respondent to bring the applicant's original ID document. The first respondent promised that she would bring it, but that never materialised.

[22] Furthermore, on 29 June 2022, the first respondent sent a voice-note to Sister Coetzee saying that the applicant's identity booklet is locked in a safe at her house for safe-keeping. The gist and content of the aforementioned voice-note was repeated again by the first respondent on 30 June 2022. Under cross examination, the version put to Sister Coetzee was that the first respondent was referring to an official notarised copy and copies thereof, not the "original ID".

[23] The applicant was not afforded an opportunity to test the first respondent's version under cross examination because the latter elected not to testify; instead, her daughter, M[...], was her surrogate. M[...]'s evidence was that, when she visited the applicant in March 2022, she saw the applicant's ID document in her handbag. Understandably, she could not comment and be of any assistance with regard to the voice-notes sent to Sister Coetzee by the mother, the first respondent.

[24] In argument, Mr Jooste argued vehemently that the applicant's evidence that the first respondent took her handbag is a figment of her imagination and should be rejected. In advancing his submissions, he placed emphasis on the fact that some of the allegations in her oral evidence are not contained in the founding affidavit. I accept that her oral evidence canvassed broader and more detailed aspects as compared to her founding affidavit. However, the applicant's version that her documents are in the first respondent's possession is corroborated by the voice-notes exchange from the first respondent to Sister Coetzee. Twice, the first respondent confirmed on the voice-notes that the applicant's 'ID booklet' are

in her possession and are locked in a safe for safe keeping. The first respondent's exact words were as follows:

“Haai Amelia, ek het nou haar ID boerie gaan uithaal want elk het dit in die kluis toegesluit, ek so bang die die goed kry voete en dan is ek nog in dieper moeilikheid”.

- [25] As indicated above, the version put to the applicant and her witness was that the first respondent would testify that the documents in her possession were notarised copies of the Identity document. The first respondent was not called as a witness, and as such, that proposition was not confirmed by her. To the contrary, her surrogate, M[...], testified that the copies were certified copies.
- [26] Mr Le Roux, for the applicant, argued that I should draw an adverse inference against the first respondent because she failed to testify in support of the allegations in her answering affidavit.
- [27] In *Elgin Fireclays Limited v Webb*,^[4] the Appellate Division (as it was then) held that, if a party fails to place the evidence of a witness who is available and able to elucidate facts before the court, such failure leads naturally to the inference that such party fears that such evidence would expose facts unfavourable to her. In the present matter, the first respondent was present in court throughout the proceedings and was available but she did not testify and reiterated her version so that it could be tested by cross examination. In light thereof, the applicant's version as well as that of her witness is uncontested. The applicant's case is that her documents are in the possession of the first respondent, and she is entitled to their return.
- [28] This application is for a final interdict, and I'm satisfied that the applicant has proved all the requirements for an interdict. No evidence was produced by the first respondent to gainsay the applicant's case. Furthermore, there is no reason why the final interdict should not be granted.
- [29] On the issue of costs, there are no reasons why the costs should not follow the results. The applicant, as a successful party is entitled to her costs. Counsel for the applicant argued for punitive costs, but I am not persuaded that this case warrants punitive costs.
- [30] In the circumstances, the following order is issued:
1. The Rule Nisi issued on 8 July 2022, as amended by the Order of the Honourable Judge Hartle, dated 16 August 2022, and the Order of the Honourable Potgieter J, dated 27 October 2022, is confirmed;
 2. The first respondent is ordered and directed to hand to the applicant or her legal representatives, within seven days from date of this order, the applicant's original identity document, passport and bank card (“the documents”);

3. The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered and directed to bear and pay the costs incurred in this application including the costs pertaining to the following appearances:
 - 3.1 The ex parte urgent application, issued and heard on 8 July 2022 before van Zyl DJP;
 - 3.2 The ex parte urgent application, issued on 18 July 2022 and heard on 19 July 2022 before Da Silva AJ;
 - 3.3 The appearance on the Rule Nisi Return date of 16 August 2022 before Hartle J;
 - 3.4 The appearance on the extended Rule Nisi Return date of 27 October 2022 before Potgieter J;
4. The first respondent is ordered to pay the costs incurred and the appearance costs on the issue referred to oral evidence on:
 - 4.1 20 July 2023;
 - 4.2 21 July 2023;
 - 4.3 27 November 2023; and
 - 4.4 29 November 2023.

N GQAMANA

JUDGE OF THE HIGH COURT

APPEARANCES: Counsel for the Applicant Adv J H F Le Roux Instructed by C/o Jacques Du Preez Attorneys Gqeberha Counsel for the 1st to 3rd Respondents Adv P Jooste and K M Morris Instructed by Quinton van den Berg Attorneys Gqeberha Heard on 20 July; 21 July; 27 November; 29 November 2023

Judgment

Delivered on 01 February 2024 N GQAMANA JUDGE OF THE HIGH COURT APPEARANCES: Counsel for the Applicant Adv Instructed by Attorneys Gqeberha Counsel for Respondents Adv Instructed by Attorneys Gqeberha Heard on 7 August 2023

Judgment

Delivered on January 2024

- [1] Concor Construction (Cape) Pty v Santam Bank Ltd 1993 (3) SA 930 (A).
- [2] Chetty v Naidoo 1974 (3) SA 13 (A), Volken Rubber Works Pty Ltd v South African Railways and Harbours 1958 (3) SA 285 (A) at 289F.
- [3] The person in charge at Link Nursing Agency.
- [4] 1947

(4) SA 744 (A) at 749 to 750.

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