

SOUTH AFRICA / JUDGMENT

Le Roux v Visser (5694/2019)

[2020] ZAFSHC 127 (30 July 2020)

[2020] ZAFSHC 127**COURT**

Free State High Court, Bloemfontein

BEFORE

Daffue

CASE / FILE NUMBER

5694/2019

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 5694/2019****In**

the matter between:

JOHANNA
CHRISTINA LE ROUX
ID
NO: [...]
Applicant
And
JOHANNA
FRANCINA VISSER
Respondent

CORAM:

DAFFUE, J
HEARD

ON:

30 JULY 2020

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 30 JULY 2020

I

INTRODUCTION

[1] Two ex-friends are at logger-heads in respect of a registered German Shepherd dog with the impressive name: Vasti von Bergheim. One is the registered owner of the dog and the other seeks an order for delivery of the dog to her.

II THE PARTIES

[2] The applicant is Ms JC Le Roux, represented by Adv DC Hattingh.

[3] The respondent is Ms JF Visser, represented by Adv R van der Merwe.

III THE RELIEF CLAIMED

[4] In her notice of motion issued as long ago as 10 December 2019 applicant seeks an order for the delivery to her of her (the applicant's) German Shephard (sic) dog, Vasti von Bergheim (herein later referred to as "Vasti") within 72 hours; alternatively, payment of R56 880.00 being the financial loss suffered by applicant as a result of her training, feeding and housing of Vasti for a period of 18 months.

IV THE PARTIES' ALLEGATIONS IN A NUTSHELL

[5] It is applicant's case that:

5.1 In March 2018 she received Vasti from respondent on certain breeding conditions to wit:

5.1.1 that she would raise, house, feed and train Vasti for dog shows as well as breeding purposes;

5.1.2 Vasti would be bred when she comes of age which is at 2 years and once the dog has her first litter of puppies, applicant will become the legal owner of the dog on condition that respondent shall receive two puppies from that first litter.

5.2 Respondent removed Vasti from her care during September 2019 and refuses to return the dog to her.

5.3 Applicant is entitled to delivery of Vasti in terms of the agreement between the parties.

5.4 Applicant suffered financial loss in respect of food, training and veterinary expenses, whilst she also built a special dog kennel at her expense to house Vasti. She claims costs of medication as well as housing for the dog at the rate of R100 per day, being the going rate charged by kennels. The claim for damages is pleaded in the alternative to the claim for delivery of Vasti.

[6] Respondent's case is the following:

6.1 She and her husband run a registered kennel known as Bergheim German Shepherd dog breeders.

6.2 She is the registered owner of Vasti.

6.3 When applicant's dog, which she had purchased from respondent, drowned in December 2017 respondent offered to lend Vasti to applicant for security, subject to applicant's obligation to care for Vasti at her own costs and for the dog to be trained at the applicant's costs.

6.4 Respondent and her husband would be at liberty to enrol Vasti for dog shows during this time, whilst Vasti would be returned to respondent once eligible for breeding – at the age of 2 years - or on demand.

6.5 Vasti was collected from applicant's premises in September 2019 for her hips to be tested, a requirement to breed with this type of dogs, whereupon it was found that Vasti did not receive her vaccinations whilst in applicant's care. Since the veterinary inspection and the Pretoria show which the dog attended, respondent kept the dog in her custody and control.

6.6 It is denied that applicant would ever become the owner of Vasti and furthermore, it is also denied that any agreement was entered into in terms whereof respondent would become liable for any expenses as claimed.

V COMMON CAUSE FACTS

[7] The following facts are common cause:

7.1 Respondent is the registered owner of Vasti.

7.2 Respondent enrolled Vasti for a dog show in Port Elizabeth on 3 November 2018 and took the dog at her costs to Port Elizabeth. The show results appear from annexure "FA7", corroborating respondent's version fully. The applicant's averment in paragraph 5 of the founding affidavit that she took Vasti to her first dog show in November 2018 is therefore not only contradicted by respondent, but applicant eventually conceded respondent's version. She states the following in paragraph 13 of her replying affidavit: "The content of this paragraph is admitted only to the effect that the Respondent indeed drove the Applicant to Port Elizabeth. The Applicant received the free lift as payment for wedding pictures she took for the Respondent."

7.3 Vasti was in the applicant's care from March 2018 to September 2019, a period of 18 months.

7.4 Respondent refuses to deliver Vasti to applicant.

VI THE HISTORY OF THE LITIGATION BETWEEN THE PARTIES

[8] The following is set out to show the enormous waste of time and costs:

8.1 Applicant intended to obtain urgent relief on 16 January 2020 – which was during recess - on which day the application was postponed to 30 January

2020. By then Vasti was in respondent's possession for a period in excess of three months. She failed to have the application served on respondent.

8.2 On 30 January 2020 the matter came before me. Still no service was effected on respondent. I postponed it to 13 February 2020 with directions pertaining to service.

8.3 Once the application was served, respondent gave notice to oppose and an answering affidavit was filed on 28 February 2020. The matter was removed from the court roll.

8.4 The replying affidavit was filed on 17 March 2020.

8.5 On 20 May 2020 an urgent interlocutory application was issued by applicant in order to obtain leave to file a so-called supplementary affidavit, to wit an affidavit by a certain Mr Kruger.

8.6 Upon receipt of respondent's answering affidavit, this interlocutory application was withdrawn without tendering costs.

8.7 On 10 June 2020 respondent brought an application for costs in terms of rule 41(1)(c) which was eventually settled.

8.8 On 11 June 2020 respondent served a notice in terms of rule 30 on applicant insofar as she merely filed a supplementary affidavit without leave of the court.

8.9 On 17 June 2020 yet another notice of motion was filed in terms whereof relief was sought to file a supplementary affidavit. This is the application that served before me together with the main application. I had to read all the earlier documents as these were bound and paginated with the interlocutory application serving before me. The last application was bound at the back of the bundle and nobody alerted me to the fact that the first 55 pages were immaterial.

8.10 The application of 17 June 2020 is opposed, but respondent decided to file a conditional supplementary answering affidavit in response to applicant's affidavit on the assumption that the court might grant the application. The applicant's conditional replying affidavit was sent to my secretary electronically on Tuesday, after closure of the court roll, and came to my knowledge this morning just before the hearing. I have not received the originally stamped document from the general office.

8.11 Counsel's heads of argument are extensive, consisting of 23 and 30 pages respectively. I was required in the practice note of applicant's counsel to read all the papers. As mentioned, many of the documents which I had to peruse in order to make sense of the case are totally irrelevant. This initially caused a lot of confusion and wasting of my time.

VII THE APPLICATION FOR LEAVE TO FILE A SUPPLEMENTARY AFFIDAVIT

- [9] In my view respondent cannot be prejudiced if applicant's supplementary affidavit is allowed. The first sub-paragraph of this affidavit is really a conclusion of what has been alleged in the founding affidavit and I specifically refer to paragraphs 5, 10.5 and 10.6 thereof. Mr van der Merwe's submission that applicant failed to allege that respondent did not breach the agreement by refusing to return Vasti to her is incorrect.
- [10] The second sub-paragraph is more contentious, but it is clear that applicant seeks, as alternative relief, to be compensated for the expenses as pleaded. Whether she may succeed eventually is not the test.
- [11] Cases must be decided on their real merits. It is apparent that applicant tried to rectify problems probably foreseen by her counsel. She waited more than 6 months to do so. On the other hand, respondent's objection is of a technical nature.
- [12] I indicated during argument to counsel that I shall allow the applicant's supplementary affidavit as well as the respondent's supplementary answering affidavit and applicant's replying affidavit thereto. Consequently they were directed to deal with costs of the interlocutory application and the merits of the main application. In the exercise of my discretion I came to the conclusion that each party shall be responsible for her own costs pertaining to this interlocutory application, including the costs of the respondent's supplementary answering affidavit as well as applicant's replying affidavit.

VIII THE JURISDICTION OF THE MAGISTRATES' COURT

- [13] This matter should have been brought before the Magistrates' Court. I forgot to obtain the parties'

submissions

in this regard, but bearing in mind the conclusion to be arrived at in the main application, this is not contentious. Section

29 of the Magistrates' Court Act reads as follows

"(1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court in respect of causes of action, shall have jurisdiction in-

- (a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette;"

(emphasis added)

The amount determined by the Minister at this moment is R200 000.00.

Section 46 of the Magistrates' Court Act reads as follows:

"46 Matters beyond the jurisdiction

- (1)
- (2) A court shall have no jurisdiction in matters-
 - (a)
 - (b)
 - (c) in which is sought specific performance without an alternative of payment of damages, except in-
 - (i)
 - (ii) the delivery or transfer of property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette; and
 - (iii)
 - (d)"

[14] There is no allegation that the value of Vasti is in excess of R200 000.00. When I prepared for the hearing I seriously considered striking the matter from the roll as this is really not a dispute that necessitates the attention of the High Court. I may add that I consulted my bench book of 30 January 2020 and noted that I made a note of this therein. I eventually decided to hear the matter. Both parties are blamed for proceeding with the matter in the manner in which they did. A simple application – a matter for the lower court - got out of hand as indicated earlier. Unnecessary costs have been incurred

and the legal representatives and their clients should really reconsider their actions or inaction.

IX THE TEST TO BE APPLIED IN MOTION PROCEDURE WHERE FINAL RELIEF IS SOUGHT

- [15] A final interdict can only be granted in proceedings on motion if the facts stated by the respondent, together with the admitted facts in applicant's affidavit, justify the granting thereof. The Supreme Court of Appeal reiterated the well-known principles as follows in Zuma:
- [26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the

facts

alleged by the latter, justify such order. It may be different if the respondent's version consists of bold or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."^[1] It is also stated in Zuma^[2] that the question of onus does not arise in motion proceedings; therefore the approach to the adjudication of motion proceedings where final relief is sought

remains applicable irrespective of where the legal or evidential onus lies.

X EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY COUNSEL

- ^[16] It is clear that the applicant does not rely on the *rei vindicatio*, but on specific performance insofar as it is her case that respondent breached the contract between them by refusing to hand over Vasti to her. The onus rested on applicant not only to prove the existence of the alleged verbal agreement, but also the terms thereof.^[3]
- ^[17] Contrary to the warning by the Supreme Court of Appeal in Zuma *supra*^[4], Ms Hattingh urged me to find for applicant based on the probabilities. She submitted that no real factual dispute had been raised insofar as respondent confirmed that a verbal agreement was entered into. The terms of the agreement are in dispute and it should be considered if respondent's version in respect thereof is false, untenable or far-fetched.
- ^[18] I am unable to find that respondent's version is far-fetched, implausible or false. Although I find it difficult to believe that a two month old puppy could make any contribution to the safety requirements of applicant and her child, I accept that Vasti would be trained to become an effective watch dog. Save for this observation, the remainder of respondent's version is such that I am not in a position to dismiss it as untrue or far-fetched. Applicant and respondent were friends.

Applicant's dog (purchased from respondent) drowned in December

2017. I cannot reject respondent's version that she was prepared – after the drowning incident - to lend Vasti to applicant until it was time to breed with her, or until she demand return of the dog. I find that respondent and her husband at their expense took Vasti to Port Elizabeth and Pretoria for dog shows and that they took her to a veterinary surgeon for hip testing which was required before they could breed with her. They would not have done this if respondent had to relinquish ownership soon.
- ^[19] In the light of my finding above, the application must be adjudicated on respondent's version, together with the facts in the applicant's affidavit admitted by her. In addition, I need to point out the following aspects in applicant's

version:

19.1 She contradicted herself. Initially she stated in paragraph 5 of the founding affidavit that she “took Vasti to her first dog show in Port Elizabeth in November 2018.” When this was disputed by respondent with documentary proof, applicant changed her story as shown in paragraph 7.2 above.

19.2 Contrary to her initial version in paragraphs 5 and 8 that she would become the legal owner of Vasti, she insisted in paragraph 12 of the founding affidavit that she “demanded the respondent to return her dog... without any success.” (emphasis added). In the notice of motion applicant seeks an order that her dog be handed over to her.

19.3 Respondent denied that applicant had paid for Vasti’s veterinary expenses and went further to state, corroborated by documentary evidence that she failed to take Vasti for her vaccinations. Applicant had an opportunity to deal with this factual dispute in her replying affidavit by inter alia attaching documentary proof of her expenses, but failed to do so. The same applies to the kennel expenses which were also challenged by respondent, in particular the version that the costs to keep a dog in a kennel amount to R100 per day.

[20] In conclusion applicant failed to prove the agreement relied upon and consequently also failed to prove breach of contract and damages. There is a fundamental dispute of fact that cannot be resolved on the papers.

[21] Just before the conclusion of her argument, Ms Hattingh submitted the court may consider referring the matter to oral evidence. This was, in my view, an attempt to avoid the inevitable. I made it clear during the course of her argument that there was a serious fundamental dispute in the versions of the parties and that I could not see on what basis respondent’s version could be rejected as untenable or false. This fundamental dispute should have been clear at the stage when the answering affidavit was filed and there is no reason why the applicant should be assisted in her last-ditch attempt.[5] Instead of requesting or arranging for referral to oral evidence much earlier, the shenanigans mentioned above were resorted to.

[22] I may add that application procedure is not the appropriate procedure to claim damages which are in essence not liquidated. Even if it could be found that motion proceedings were appropriate in this case, it must be borne in mind that the affidavits in motion proceedings constitute both the pleadings and the evidence. No doubt, applicant’s claim is unliquidated and needed to be properly proved.[6] She failed to place sufficient evidence before the court in order to succeed.

XI COSTS

[23] Even if applicant was successful in the main application, I would have awarded costs on the applicable Magistrates’ Court scale only. She decided to bring the respondent into the High Court arena and insofar as the application stands to be dismissed, it would be just and equitable for the court to grant costs in favour of respondent on the High Court scale.

XII

ORDERS

[24] The following orders are issued:

1. Leave is granted to applicant to file her supplementary affidavit dated 4 June 2020.
2. Respondent's supplementary answering affidavit dated 23 July 2020 and applicant's replying affidavit thereto are accepted as part of the evidential material before the court.
3. Each party shall be responsible for her own costs pertaining to the interlocutory application for leave to file a supplementary affidavit.
4. The main application is dismissed with costs, including all costs previously reserved.

J P DAFFUE, J

On behalf of Applicant: Adv D Hattingh

Instructed by: WJ BOTHA INC

BLOEMFONTEIN

On behalf of Respondent: Adv R van der Merwe

Instructed by: PHATSHOANE HENNEY

[1] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009

(2) SA 277 (SCA) at par 26.

[2] Ibid par 27; see also, Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere 1988 (4) SA 224 (A).

[3] Kriegler v Minitzer & Another 1949 (4) SA 821 (A) at 827. Insofar as the respondent confirms the existence of a verbal agreement, but relies on different terms, the onus remains on applicant to prove that those terms relied upon by respondent do not form part of the agreement between the parties.

[4] Loc cit par 26

[5] Applicant did not ask for referral of the matter to oral evidence or sent to trial at the opportune moment, but only as a last resort when it became apparent during argument that the court was faced with a fundamental dispute. See Transnet Ltd t/a Metrorail v Rail Commuters Action Group 2003 (6) SA 349 (SCA) paras 22 and 23. See also Airports Company SA Ltd v Airport Bookshops Pty Ltd t/a Exclusive Books 2017 (3) SA 128 (SCA) par 5 in which case the factual dispute centred on the interpretation of a letter recording an extension of the lease between the parties.

- [6] See Minister of Land Affairs and Agriculture v D&F Wevell Trust 2008 (2) SA 184 (SCA) par 43 at 200 D and the notes to Rule 39 (1) of the Uniform Rules of Court pertaining to trial procedure in Erasmus, Superior Court Practice, vol 2 at D1 – 527.
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