IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 21/19630

REPORTABLE: ~~YES~~ / NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED.
04/02/2022

In the matter between:

K[....], L[....] Applicant

and

K[....], P[....] Respondent

JUDGMENT

MKHABELA AJ:

[1] This is an application for *rei vindicatio* in terms of which the applicant seeks an order compelling the respondent to allow her to collect certain movable property ("the goods") as defined in annexure RA1 to the replying affidavit.

[2] In addition, the applicant seeks various ancillary relief including that her attorney should be present when she collect the goods as well as costs on attorney and own client scale.

[3] The applicant is an adult married female who resides at Unit No 8, Hurlingham Close, [....] S[....] Road, Hurlingham, Sandton, Johannesburg, Gauteng Province.

[4] The respondent is an adult married male businessman and the estranged husband of the applicant who resides at [....] Livingstone Falls, Waterfall Country Estate ("the Waterfall Estate").

[5] For convenience, I shall refer collectively to the applicant and the respondent as the parties. The parties got married to each other on 14 July 2018 and the marriage still subsists. One minor child was born out of the marriage and currently lives with the applicant. They are however in the middle of an acrimonious divorce and this has largely led to the current application.

[6] Subsequent to their marriage in 2018 the parties lived together as husband and wife in Hurlingham for most of their marriage life and only moved into the Waterfall Estate on 19 November 2020.

[7] It is common cause that within a month after moving into the Waterfall Estate, the applicant moved out of the Waterfall Estate house on 19 December 2020 and has never returned ever since.

[8] It is not disputed that when the applicant moved in into the Waterfall Estate, the applicant brought with her certain goods of which some form the subject matter of her *rei vindicatio* application.

[9] When the applicant moved out of the Waterfall Estate on 19 December 2020, she left behind most of her goods and although at a later stage the respondent allowed her to collect some of her goods on two separate occasions she did not take all of them of which she now wants to collect. After the launch of the application, the respondent delivered certain goods that belonged to the applicant. This necessitated the applicant to amend the list of the goods that are still outstanding. She did so in her replying affidavit in terms of annexure RA1.

[10] The list of her outstanding goods are itemised in terms of annexure RA1 in the founding and replying affidavits and consists of about 42 instead of the initial 95 items as reflected by annexure KL1 attached to the notice of motion. Item 95 is a 2016 Porche Carrera 911, registration number [....] and VIN number [....] ("the vehicle"). The applicant's case[1] in respect of the vehicle is that the vehicle is registered in her name as the owner and the respondent is in possession of the vehicle.

[11] It is evident that with the exception of the vehicle, most of the goods that the applicant wishes to collect from the respondent consists of furniture, kitchenware, linen and other personal items that the applicant purchased and brought along when she moved in with the respondent into the Waterfall Estate.

[12] Since moving out of the Waterfall Estate, the applicant contends that the respondent is currently refusing to return the goods to her despite numerous requests that the applicant had made through her attorneys of record. The respondent s' refusal has caused the applicant to launch this application.

[13] The respondent opposes the relief that the applicant seeks mainly on three related grounds. First, that in respect of the vehicle, the respondent has never owned it and therefore could not have gifted it to the applicant, further, that the vehicle is owned by a Close Corporation called Sithala Plant Hire CC (the CC). Second, the other goods have been returned to the respondent, third the applicant has not shown that she purchased the goods in question and some of the goods are not hers, moreover, that he is keeping the clothes belonging to the minor child since he is seeking primary residence of the minor in the divorce action that is still pending before this very court.

[14] Counsel for the respondent in his written and oral submissions contended that there are disputes of facts in relation to the ownership of the vehicle and that the matter cannot be decided on the papers without a referral to oral evidence. In

[1] Although the applicant does not expressly explained in her founding affidavit, it is clear from the content and the reading of the papers that she basis her ownership of the vehicle by virtue of the fact that the vehicle is registered in her name. The reason behind the registration and ownership of the vehicle is that it was given to her as a birthday gift by the respondent.

relation to the other goods, it was submitted that the applicant has failed to prove that she is the owner of the goods and that the application be dismissed since the applicant has failed to make out a case in her founding affidavit about her ownership of the goods.

[15] In his answering affidavit, the respondent alleged that she does not know how the vehicle was ultimately registered in the name of the applicant in the absence of authority to do so either from him or his father who is a member of the CC. According to the respondent, the vehicle is owned by the CC since it was bought by it.

[16] The respondent stated further that the vehicle was meant to be driven by his father whenever he would need a car on his visit to Johannesburg and both the applicant and the respondent were allowed to drive the vehicle from time to time.

[17] The applicant in her replying affidavit annexed various emails and WhatsApp communication that were exchanged among the respondent, the applicant and the Porsche dealership in Durban in respect of the change of ownership and registration of the vehicle into the applicant's name.

[18] In respect of the other goods, the applicant stated that she had to amend the list of the outstanding goods in the light of the fact that the respondent has subsequent to the launch of the current application caused certain of the outstanding goods to be delivered at her home. However, the applicant stated that certain goods were still outstanding as reflected by annexure RA1 attached to the replying affidavit.

[19] In the heads of argument counsel for the applicant referred me to very relevant authorities on the question of ownership.[2] The case on point is that of *Chetty v Naidoo*[3] and the relevant quotation reads as follows:

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[2] Both Counsel are unanimous that the applicant has rightly invoked the remedy of *rei vindicatio* to claim her alleged goods. The dispute between the parties is whether the applicant has been able to prove her ownership on the papers.

[3] *Chetty v Naidoo* 1974 (3) SA 13 (AD) at page 17.

"once it has been established that the applicant is the owner of the property and that the respondent is in possession then the onus is on the defendant to prove that he has the right to possess the property".

[20] The same principle regarding ownership was reiterated in the case of *Prinsloo v Venter and Others*.[4] I can do no better than to reproduce the relevant quotation which reads as follows:

"it is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withheld it from the owner unless he is vested with some right enforceable against the owner (eg. a right of retention or a contractual right) the owner in instituting a rei vindicatio, need, therefore, do no more than allege a right and prove that he is the owner and that the defendant is holding the res – the onus being on the defendant to allege and establish any right to continue to hold against the owner."

[21] In respect of the vehicle, counsel for the applicant submitted that the respondent cannot establish any right to hold the vehicle against the applicant as owner. I agree. In my view the fact that the vehicle is registered in the applicant's name concomitant with fact that the correspondences in the papers show that the respondent was involved in the registration and change of ownership after the vehicle was bought is decisive in respect of the question of ownership. There is also no dispute that the applicant left the vehicle in the possession of the respondent when she left the Waterfall Estate.

[22] The respondent's assertion that "he is at the loss how it came about that the vehicle was registered in the name of the applicant" is not only false but a blatant lie perpetuated to mislead the court and is tantamount to perjury in the light of the correspondences exchanged among the respondent, applicant and the Porsche dealership.

[4] *Prinsloo v Venter and Others* 80848/2014, 10 December 2014 at para 53; [2015] ZAGPPHC, 10 December 2015.

[23] The respondent's claim that the vehicle was meant to be driven by his father and that it is owned by the CC is not corroborated by any evidence. No confirmatory affidavit was attached to the answering affidavit from his father or any of the other members of the CC.

[24] The applicant's case in respect of ownership of the other goods is also not seriously disputed by the respondent. In his answering affidavit[5] the respondent stated as follows "there are items packed in boxes for the applicant's collection". Further, on 30 April 2021, the respondent sent certain goods to the applicant and this was after the launch of the current application. This means that the respondent acknowledged that he was still in possession of the applicant's goods at least prior to the institution of the current proceedings. The probability therefore exist that there are still other goods (packed) at the Waterfall Estate to be collected by the applicant as the respondent asserted in his answering affidavit.

[25] There remains the question of disputes of fact raised by counsel for the respondent. In the light of the Plascon-Evans rule that is well established in our law and does not require any restatement, I am enjoined to examine each and every alleged dispute of fact in order to determine whether in truth there is a real or genuine dispute of fact. The alleged dispute of fact in relation to the vehicle is not substantiated by the any evidence, on the contrary, the evidence indicates that the applicant is the owner if the definition of owner and holder in terms of the National Road Traffic Act, 93 of 1996 is taken into account.

[26] The referral to evidence in respect of the vehicle will not disturb[6] the balance of probabilities that the applicant is the owner of the vehicle and that the respondent facilitated the change of ownership into the respondent's name since the vehicle was bought as a second hand through auction. This fact corroborates the applicant s' version that the vehicle was bought and gifted to her by the respondent.

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[5] Para 17 of the answering affidavit.
[6] *Mv Pasquale Della Gatla, Mv Fillippo Lembo, Imperial Co v Deiulemar Di Navigazione Spa* 2012 (1) SA (SCA).

[27] *Viva voce* evidence would also not disturb the incontrovertible evidence that the respondent is still in possession of some of the goods belonging to the applicant. The respondent confirmed in his answering affidavit that there are items packed in boxes for the applicant's collection. Further, the respondent delivered some of the goods on 30 April 2021. The inference that there are still other goods left at the Waterfall Estate will remain irresistible and warranted even after oral evidence.

[28] In any event it is trite that a party may not seek to lead oral evidence to make out a case that was not already made[7] out on the papers. Furthermore, it would be an exercise in futility to refer a matter to oral evidence based on speculation which does not involve a real dispute of fact because there would no facts that would be elicited.[8]

[29] In my view, the respondent's assertion that he is suspicious as to how the vehicle came to be registered in the name of the applicant amounts to false speculation which is contrary to documentary evidence and is so fanciful that the court is entitled on the facts to reject it . In the circumstances, I am inclined to exercise my discretion that there are no real dispute of fact that warrant a referral of the question of ownership of the goods to oral evidence. A robust approach is justified on these peculiar facts. Failure to do so would negate the speedy remedy that motion proceedings affords litigants.

[30] It follows that the application should succeed as I am of the view that it is not necessary to deal exhaustively with the other defences that the respondent had raised. The applicant has requested cost on attorney and own client scale. In the light of the fact that the respondent lied under oath about not knowing how the applicant acquired ownership as well as the fact that the respondent delivered some of the applicant's goods after the applicant has sought the assistance of the Court, I am inclined to exercise my discretion in favour of awarding punitive costs.

[31] However, in my view, the applicant's founding and replying affidavit canvassed at length issues pertaining to the divorce court and thereby unduly

[7] *Dodo v Dodo* 1990 (2) SA 77 (W) 91.
[8] *Standard Credit Corporation Ltd v Smyth* 1991 (3) SA 179 (W)

burdened the record in the current application. It would therefore not be fair to the respondent to make him liable for all the costs of the application. A reduction of a certain percentage of the costs is warranted.

[32] I accordingly make the following order:

1. The respondent is ordered to allow the applicant to collect the goods, including the vehicle and all the goods as reflected in annexure RA1 attached to the replying affidavit.

2. The applicant and the respondent's respective attorneys or their representatives must be present when the applicant collects the goods.

3. The respondent must communicate a date and time to the applicant s' attorneys in terms of which he would allow the applicant to collect the goods which must not be later than 7 (seven) working days from the date of this order.

4. The respondent is ordered to pay 80% (eighty percent) of the applicant's cost on attorney and own client scale.

R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 2 February 2022.

COUNSEL FOR THE APPLICANT:	M Feinstein
INSTRUCTED BY:	Kirshen Naidoo & Company
COUNSEL FOR RESPONDENT:	J Julyn SC
INSTRUCTED BY:	Karen Olivier
DATE OF THE HEARING:	28 October 2021
DATE OF JUDGMENT:	02 February 2022