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

CASE NO: 2021/7136
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
21 OCTOBER 2022

In the matter between:

SHAUN JEREMY SMITH	Applicant
And	
SHEENA SMOLAK	First Respondent
PAWEL SMOLAK	Second Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 21 October 2022.)

JUDGMENT

MIA, J

[1] The applicant and the respondents were previously neighbours and together they took care of a dog named Nelly. This arrangement endured until the applicant relocated to Cape Town. A change then arose regarding what the parties intended in

relation to their responsibility and time with Nelly. The applicant now brings an application for final relief to exercise his co-ownership rights over Nelly. The applicant asserts that the respondent has denied him such co-ownership rights. The respondents oppose the relief indicating that the applicant has not established the requirements for final relief on a balance of probabilities.

[2] The applicant is an Information Security manager residing in Sunningdale Cape Town at the time of the application. The first and second respondents currently reside in Eagle Rock with their physical address at L [....] P [....] Street, W [....], Roodepoort. This court has jurisdiction as the first and the second respondents reside within the court's jurisdiction. Nelly who is the subject of the application is currently based with the second respondents.

[3] It is necessary to sketch a brief background to the matter to appreciate the parties' positions in the dispute. In December 2017, the respondents and applicant became the co-owners of Nelly when Nelly's previous owner transferred ownership to them after they paid Nelly's veterinarian bill and because they were able to provide more suitable care for Nelly. At that time each of the three parties agreed they shared equal responsibility over Nelly as they resided in the same complex and each contributed to the care of Nelly. Whilst they lived in the same complex they each exercised equal and alternate possession of Nelly as if they were the lawful owners of Nelly.

[4] In February 2019 they agreed to have Nelly covered by medical insurance and paid for medical aid cover. The applicant agreed to contribute one-third towards the monthly instalment. The respondents however requested that the applicant pay half of the instalment as Nelly spent half of the time in the applicant's care. The applicant agreed to this contribution and made the payment following this discussion. The applicant made the payment of his half of the medical aid contribution into the first respondent's bank account. The full amount of the medical aid was debited from the first respondent's account. The parties also agreed to pay a certain amount each month into a savings account. This served as an emergency fund to be used for Nelly in case of a medical emergency. The applicant contributed R250 each month towards the savings fund which is also held in the first respondent's name.

[5] In view of the financial contributions as well as the physical care to which he contributed, the additional expenses paid towards grooming and food which he contributed towards, the applicant asserts that he is a fifty percent co-owner of Nelly. He indicates that he cared for Nelly for fifty percent of the time whilst he was in Johannesburg and he contributed a fifty percent portion toward the expenses as requested by the first respondent in view of the portion of time he spent with Nelly. Prior to the applicant's departure to Cape Town, the applicant and the respondents maintained a good relationship and exercised care over Nelly without any need for a formal written arrangement to regulate their rights over Nelly.

[6] Their verbal agreement was exercised as follows, every day of the week Nelly would alternate between the applicant's and the respondents' homes where one of the parties would simply drop Nelly off at the other party's home. During holidays, leave days and public holidays the parties would schedule the time by agreement. This position changed in approximately September 2020 when the applicant interviewed for a transfer to a company based in Cape Town. Once the transfer was confirmed, the applicant discussed arrangements relating to Nelly and how he was going to manage to care for Nelly whilst in Cape Town which would benefit Nelly. The applicant arranged a meeting for 22 September 2020 when the respondents were celebrating the second respondent's birthday. On that occasion they discussed the applicant's plans to move to Cape Town. The applicant discussed the possibility of paid flights and requested that the respondents temporarily take care of Nelly whilst he settled into his new home in Cape Town even though this was a deviation from their usual routine. The applicant states that he did this as he did not wish to subject Nelly to the chaotic process of unpacking and moving when there was a reasonable alternative during this period. Whilst greeting the respondents, they discussed the question of the emergency savings fund and agreed that it has reached an adequate amount. The applicant undertook to pay in cash at the time if anything happened to Nelly that required funds in addition to the amount in the account.

[7] In October 2020 the respondents sent an email to the applicant wherein they mentioned that Nelly would reside with them for ninety-nine percent of the time, and

that the applicant could visit on *ad hoc* basis when in Johannesburg, which they proffered would be a suitable arrangement to them. They indicated that they did not agree with longer periods which entailed transporting Nelly to Cape Town, as they did not believe it was feasible and did not agree to this as an option. They put forward their view that the agreement had been that whichever party decided to leave South Africa would in that decision decide to leave Nelly behind. They extended this to the applicant's decision to leave the province and his decision to relocate to Cape Town which had been voluntary. They reiterated that they did not believe that flying Nelly between Cape Town and Johannesburg was in Nelly's interests.

[8] The applicant disagrees with the respondent's version of the agreement, and denies that he ceded possession of Nelly indefinitely or that he ceded equal co-ownership of Nelly. He maintains that he was clear on his co-ownership and arrangements relating to her care and ownership. His view is that possession and ownership of Nelly would only be relinquished upon immigration outside of South Africa. In support of his co-ownership he indicated that he researched the option of flying Nelly between Johannesburg and Cape Town at his own cost and maintained the payment towards her medical insurance.

[9] The parties have attempted to find a solution by way of mediation and this has been unsuccessful. The court is required to consider whether the applicant has a clear right with regard to co-ownership of Nelly and whether the applicant has established the requirements for a final interdict, on a balance of probabilities.

[10] The law is settled on the requirements for a final interdict. The applicant must prove that he has a clear right in respect of ownership of Nelly. He must further prove harm or an injury committed or reasonably apprehended, and that there are no alternative protections or remedies.[1]

[11] Having regard to the facts of the present matter, the question of ownership is determined by an enquiry into the agreement between the parties. Where a dispute

[1] *Setlogelo v Setlogelo* 1914 AD 221 227.

arises pertaining to their agreement about ownership of Nelly, as has occurred between the present parties it is instructive to have regard to what they said and wrote as well as their actions pertaining to the agreement[2]. In interpreting the agreement albeit a verbal agreement the principles applicable and espoused by our courts are relevant.

[12] The context of the agreement sheds light on the parties' intention where there is ambiguity or different views on the same facts. The Court stated in the case of *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021(6)1 CC at paragraph [67];

> "[67] This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded. As the Supreme Court of Appeal held in *Novartis*:
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> > 'This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties — what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. . . . A court must examine all the facts — the context — in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing."

[13] In applying the above to the present matter, the version of the applicant and the respondents indicate that the parties shared the care of Nelly and acted as the co-owners of Nelly from December 2017 until the applicant relocated to Cape Town after 22 September 2020. The position then changed in that the applicant no longer contributed to the emergency fund toward Nelly's care, however he continued to

[2] The Law of Contract of South Africa, 7th Edition 2016, RH Christie. Chapter 5.1

contribute fifty percent of the medical insurance contribution. The applicant did not know where he would live in Cape Town and whether his home would be pet friendly. Notwithstanding his relocation he indicated that he would continue to contribute toward Nelly's care and paid toward the medical insurance. He also requested that Nelly be taken to visit his mother from time to time. The respondents' agreed to this arrangement. The applicant did not relinquish his co-ownership of Nelly as he requested to continue seeing her during his visit to Johannesburg. The respondents indicated that they did not agree to the rights which the applicant wished to exercise in respect of Nelly after he left Johannesburg. They also chose to extend the interpretation of immigration to relocation. It is evident thus that the applicant has a right in respect of Nelly.

[14] Having established a right in respect of Nelly, it is also evident that the applicant left Nelly in the care of the respondents as he believed it was in Nelly's best interests. He was not sure where he would reside or that he would live in a pet friendly environment. In view of the circumstances under which the parties came to take ownership of Nelly it is understandable that there is concern for Nelly's well-being and given the nature of Nelly, the respondents are concerned about her travelling to and from Cape Town. Whilst the applicant has researched the possibility of Nelly flying to and from Cape Town, it is not evident on the papers that it is favourable for Nelly to do so in order for the applicant to exercise his right of ownership. The applicant is required to show that he will suffer an injury or irreparable harm. I am not persuaded on the papers that the applicant has done so on a balance of probabilities. The report filed by Ms Leigh Shenker suggests that long distance travel is not suitable for Nelly and will be harmful for her. The injury or harm if the relief as requested by the applicant is granted will be realised and will be visited upon Nelly. The trips between Johannesburg and Cape Town by flight or by road may not be in Nelly's best interest and may contribute toward and lead to deterioration in health. The applicant has not demonstrated that he will suffer an injury.

[15] I turn to the question whether there is an alternative remedy. It is evident that the applicant seeks to maintain his co-ownership of Nelly and his relationship with Nelly. There does not appear to be any reason why this should not be an option

where the applicant makes the effort to travel to maintain his rights as the co-owner and to spend time with Nelly. There is no reason why this should not occur if the applicant travels to Johannesburg and Nelly spends time with him in Johannesburg. The respondent's insistence that the residence be across the road is unrealistic. It suffices that the applicant is in the same city and Nelly does not need to travel long distances.

[16] In view of the possibility of the applicant being able to see Nelly whilst he is in Johannesburg there is another satisfactory remedy available. I've considered that the respondents have tendered contact with Nelly to the applicant. They have offered the applicant reasonable contact with Nelly when the applicant is in Johannesburg to enable the applicant to maintain his relationship with Nelly. In this offer there is an alternative to the relief requested by the applicant. Thus, the applicant has not succeeded in proving all three grounds to succeed with a final interdict.

[17] The normal costs order is applicable.

ORDER

[18] Having regard to the above I make the following order:

1. The application is dismissed.

2. The applicant is to pay the costs of the application.

S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant : Adv B van der Merwe

Instructed by : Wright Attorneys Inc

On behalf of the first respondent	: Adv B Manning
Instructed by	: Mashabane Liebenberg Sebola Inc
Date of hearing	: 03 November 2021
Date of judgment	: 21 October 2022