IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 2021/4290
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED: YES/NO
DATE:19/09/2023

In the matter between:

D[…] J[…] S[…] (Snr)	**FIRST APPLICANT**
D[…] J[…] S[…] (Jnr)	**SECOND APPLICANT**
ONVERDIENT (PTY) LTD	**THIRD APPLICANT**
AND	
A[…] S[…]	**FIRST RESPONDENT**
TRIPLE OPTIONS TRADING 641 CC	**SECOND RESPONDENT**

JUDGMENT

NGOBENI AJ

This judgment is handed down electronically by circulation to the parties through the applicants' legal representative's e-mail address, and to the

personal e-mail address of the first respondent.
The date for the hand-down is deemed to be 19 September 2023.

[1] This matter came before court by way of an application in which the applicants apply for the orders in the following terms:

> (i) That the first respondent be ordered to sign all papers necessary and deliver to the first applicant all documents necessary to transfer all her shares in Onverwacht (Pty) Ltd to the first applicant within five days of service of the order on her, failing which the sheriff will be authorised and directed to sign the relevant documents on her behalf,
>
> (ii) That the first respondent be ordered to sign all papers necessary to transfer half the ownership in Farm Waterval, Alma, Limpopo Province, to the second applicant within five days of the presentation of the relevant documents by the applicants and/or their conveyancing attorneys, failing which the sheriff will be authorised and directed to sign the relevant documents on her behalf,
>
> (iii) That the first respondent be ordered to allow the applicants free access to Farm Waterval,
>
> (iv) That the first respondent accounts to the second applicant for the income of Farm Waterval from date of divorce, being 17 February 2020 to date of court order and provides a statement and debate of account within 30 days of service of the order on her, and:
>
> > (a) the first respondent be ordered to pay the second applicant his half share of any profits from the income of the running of Farm Waterval as determined out of the statement and debate of account,

(v) That the respondents are to pay the third applicant the monies for the sale of the third applicant's land being the sum of R206 698-94 jointly and severally, the one paying, the other to be absolved,

(vi) The second respondent be ordered to pay the first applicant the sum of R774 606-63 being the amount due and owing in terms of the first applicant's loan account with the second respondent,

(vii) The second respondent is to pay the third applicant rental due in the amount of R742 500-00,

(viii) That the first respondent is to deliver to the first applicant 200 nyalas,

(ix) That the matter be referred to the National Director of Public Prosecutions (NDPP) for investigation pertaining to A[…] S[…]'s unlawful conduct with specific reference to, but not limited to:

(a) perjury,

(b) falsifying and/ or fraudulently and / or manufacturing and / or altering close corporation documents, and,

(c) any other matter that the NDPP deems necessary, which investigation will permit, but not limited to both current and previous members of Triple Options Trading 641 CC to make representations to the NDPP.

(x) That the respondents be ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved,

(xi) Further and/or alternative relief.

[2] I will hereinafter refer to the prayers as per their numbering in the amended notice of motion, although in this judgment I had to number the prayers differently because of the numbering of the paragraphs of this judgment. This matter was set down for hearing on 14 August 2023, and Mr A.S.M. van Jaarsveld, from Marinus van Jaarsveld Attorneys, appeared on behalf of all the applicants. The first respondent appeared in person and informed the court that she is also representing the second respondent, as her funds for legal representation are depleted and she requested that the matter be postponed so that she could get money to pay her legal representatives. There was no notice of withdrawal or any correspondence in the court file at that stage from the erstwhile legal representatives of the respondents with regard to the proceedings of 14/08/2023. The applicants opposed the application for a postponement on the basis that they were ready to proceed.

[3] I denied the application for a postponement, mainly because it took the applicant almost a year to get the matter to be heard because of the fullness of the court rolls. The matter was placed for the 14/08/2023 already on 03/10/2022, and if the matter was to be rescheduled for another day, it would take almost the whole year, and that is the time period to be expected before the matter could be heard again. I also denied the application for a postponement because the first respondent told the court that she was going to wait for the peach harvest, so that she could get money to fund her litigation.

[4] There was no certainty in that regard, and because of the fact that there was no correspondence or communication from her legal representatives, it would be unreasonable to postpone the matter with all those uncertainties. I then ordered that the matter be proceeded with, and the first respondent appeared in person representing the second respondent as well. The applicants also incurred costs for the appearance which could not be recovered from the respondents as they couldn't even afford their own costs.

The case of *Lekolwane* & *another v Minister of Justice and Constitutional Development*[1] finds application in this regard.

[5] The first applicant (Mr S[…] Snr) and the first respondent (Mrs S[…]) were married to each other and got divorced on 17/02/2020, before Honourable Madam Justice Van Der Schyff, AJ in the High Court, Gauteng Division in Pretoria. In the divorce proceedings there was a deed of settlement which was entered into between the first applicant and first respondent, which was then made an order of court. I must however mention that the deed of settlement was signed and dated 15/11/2014 and there is also another date of the 18/02/2020 under the first mentioned date on the part of each party. I don't see any issue with regard to those dates mentioned, because the deed of settlement was made an order of court on 17/02/2020.

[6] I have already outlined in the opening paragraphs as to what the application is all about, but for easy reference I will explain the role of all the parties in this application. The second applicant is the son of the first applicant and the first respondent. The third applicant and the second respondent were the family businesses of the first applicant and the first respondent before they got divorced. When the first applicant and the first respondent got divorced, in their settlement agreement they agreed that the second applicant would sign over 25% of his shareholding over the company known as Onverdient Pty Ltd (Onverdient), to the first applicant.

[7] The first respondent according to the settlement agreement was supposed to sign over her 25% shareholding over the company Onverdient Pty Ltd, to the first applicant, which simply meant that the first applicant would then get 50% shareholding from the second applicant (his son) and the first respondent (his ex-wife, Mrs S[…]).

[8] The first applicant was according to the settlement agreement, to transfer

[1] 2007 (3) BCLR 280 (CC).

his 50% member's interest in Triple Options Trading 641 CC (Triple Options) to the first respondent and their son (second applicant). The first applicant as per the settlement agreement transferred his 50% member's interest to both the second applicant (their son) and the first respondent (Mrs S[...]) as agreed. The basis of the dispute before this court is that the first respondent (Mrs S[...]) has to date not transferred her 25% shares interest in Onverdient over to the first applicant (Mr S[...] Snr) as agreed in the settlement agreement.

[9] The first respondent has filed her answering affidavit, and above that she was given an opportunity to fully address the court *viva voce* as that opportunity was also afforded to the legal representative of the three applicants. It is important to mention that her address in court was in line with what was stated in the answering affidavit of the respondents. The first respondent agrees, as per her submissions in the answering affidavit, that indeed the first applicant transferred his 50% member's interest in Triple Options to her in the year 2016, not the year 2015 as he alleged. She admits that she didn't transfer her shares held by the third applicant (Onverdient), because the first applicant was not co-operative and refused to take part in the discussions with her after the divorce, and he refused to sign the papers. She however still tenders the transfer as per the settlement agreement.

[10] Her submission with regard to transferring half of Farm Waterval to the second applicant is that transfer of land would be a nullity because that would breach the Subdivision of Agricultural Land Act 70 of 1970 (SALA), and she then decided to open a Trust Deed, registered in her names, which according to her she wanted to transfer the portion of the property which she co-owns with her son into that Trust to give effect to the settlement agreement. I must state from the outset that according to SALA, for subdivision of agricultural land to take place, the approval of the Minister of Agriculture, Land Reform and Rural Development (Minister) must first be obtained.

[11] It must also be noted that SALA has been repealed by the Subdivision

of Agricultural Land Act Repeal Act 64 of 1998 (Repeal Act), which is not in operation as yet, or put differently the commencement date has not been proclaimed as yet. The first respondent and the second applicant according to the divorce settlement were to co-own farm Waterval portions 1,2 and 3, and not subdivide the farm. Even if they wanted to subdivide the farm, all what is needed in my view, is the approval of the Minister. It is therefore misleading to say that it is not allowed for agricultural land to be subdivided. The Repeal Act is not in operation yet, and in my view the *status quo ante* remains, and the Minister must still give approval.

[12] The applicants allege that Triple Options (second respondent) trades from the other portion of farm Waterval which is owned by Onverdient (third applicant) and refuses to pay rental. The first respondent submits that Triple Options (second respondent) refused to pay rental to the first applicant because no rental was ever agreed upon, and therefore the second respondent doesn't owe the first applicant nor the third applicant any money for rental.

[13] On the issue pertaining to Nyalas, the first respondent avers that the first applicant removed an unknown number of nyalas from farm Waterval, and she doesn't know whether there are still nyalas on farm Waterval or not because the nyalas breach the fence and roam free, she however offers half the nyalas that are currently there at farm Waterval to the first applicant. She further submits in her answering affidavit that removal must be done under supervision.

[14] The first respondent doesn't know as to how many nyalas are there currently on the farm. She denies that 200 nyalas can be kept on a 3-hectare farm. She denies that the first applicant is entitled to the progeny of the nyalas. She denies that the first applicant has the right to claim half of the fruits at farm Waterval. The first respondent denies that she stole farm Waterval from her son because her son (second applicant) is the beneficiary

in the Trust that she opened because she could not transfer land. The first applicant refused to sign the papers pertaining to that. The first respondent denies that she owes the third applicant an amount of R250 000-00 for the sale of a portion of land that was sold to one Koot van Staden by Onverdient. She avers that the money must be claimed from the said Koot van Staden as she and the second respondent are not parties to the agreement that was entered into between Onverdient and Koot van Staden.

[15] The first respondent in the answering affidavit states that the issue pertaining to rental that is claimed by the third applicant from the second respondent is now *'res judicata',* as Kganyago J dealt fully with that aspect and dismissed the application. On the issue of her refusal to allow the first and second applicants on farm Waterval, she said that she fears for her life. The first respondent claims that the amount of R774 606-63, being a loan amount that the first applicant gave to the second respondent was ceded to her in terms of a resolution that was taken in a meeting on 02/05/2016.

[16] It is common cause in this matter that although the first applicant and the first respondent only got divorced on 17/02/2020, there was a settlement agreement that was entered into between them before the divorce, and the parties themselves started implementing the terms of that settlement agreement even before it could be made an order of court by the divorce court. That is evident from the fact that the first applicant already in the year 2015 or 2016 transferred his 50% membership interest in the company Triple Options (second respondent) to the first respondent. It was not only that transaction that took place between them, but there were other transactions which were dealt with as per their settlement agreement which are not necessary to mention at this stage.

[17] The first respondent in the answering affidavit made it clear that she intends transferring her 25% shareholding in the company Onverdient to the first applicant. When she addressed the court in person she still reiterated that

she intends to perform in terms of the agreement with the first applicant in as far as her shares are concerned in Onverdient. The reasons that she gave for failure to do so since 2014, or at least the year 2020 after the settlement agreement was made an order of court, are in my view not persuasive. The second applicant was initially staying with his mother on farm Waterval, but he has since moved out, hence he is seeking half share profits from the farm and that the farm be registered in his names in as far as his portion is concerned.

[18] The dispute between the parties remains whether the second respondent is indebted to the first applicant for the amount of R774 606-63 which was a loan that was advanced to the second respondent, payment of an amount of R206 698-94 by the two respondents for the sale of a portion of land that was sold to one Koot van Staden, whether the second respondent is to pay rental to the third applicant for the amount of R742 500-00, whether the first respondent is to deliver 200 nyalas to the first applicant, referral of the matter to NDPP and lastly whether the respondents are liable for the costs of this application. The second applicant also seeks an order for the first respondent to account to him about the income at Waterval farm from 17/02/2020, being the date of divorce of his parents, and he also seeks half share of the profits from the income of the running of farm Waterval that his mother got from the period after the divorce.

[19] In dealing with the issues in dispute I will start by dealing with prayer 7 on the notice of motion pertaining to the rental that is said to be due in the amount of R742 500-00. The response of the 2nd respondent as outlined in the answering affidavit is that the matter has been dealt with and a judgment was given in relation to that dispute. I was referred to the judgment of Kganyago J, and upon reading the judgment, I observed that the application was dismissed, as the court didn't deem it necessary to refer the dispute for oral evidence, because the court was not persuaded that there was a rental agreement that was in place. I therefore find that the issue pertaining to rental has already been dealt with by another court.

[20] According to the well-known principle of *Plascon-Evans rule,* when factual disputes arise in an application, relief should be granted only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order. To quote from the judgment itself, *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd*[2]*,* on paragraph 8, the court said the *following "It is correct that where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order"*

[21] There may be exceptions to the general rule, for example where the allegations of denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers, as was said *in Associated South African Bakeries (Pty) Ltd v Oryx* & *Vereinigte Backereien (Pty) Ltd en Andere*[3] *·However, Rule 6(5) (g) of the Uniform Rules states that: "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with* a *view to ensuring* a *just and expeditious decision .In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with* a *view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as* a *witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.* In that regard the cases of *Ntsala v Rustenburg Local Municipality*[4] *and Another and MR and NR*[5] also deal with the question of referral of applications in terms of Rule 6 (5) (g).

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[2] (53/84) [1984] ZASCA 51; (1984] 2 All SA 366 (A) (21 May 1984).
[3] 1982 (3) SA 893 (A) at pages 923G-924 D.
[4] (M124/20) [2021] ZANWHC 48 (20 April 2021).
[5] (A151/2022) [2023] ZAWCHC 48 (1 February 2023).

[22] In the case at hand, it is common cause that the farms which are referred to in the divorce settlement agreement as Waterval farms 1,2 and 3 are the ones which were supposed to be transferred into the names of the second applicant and the first respondent. The costs of the transfer were to be borne by the first respondent, and that transfer has not taken place as yet, which means that effect to clause 3.1.1.3.3 has not been fulfilled by the parties themselves. In my view the first applicant, his son being the second applicant and the first respondent must act according to the terms of the settlement agreement. It is however clear from the papers and the submissions made in court that because of the acrimonious nature of the relationship between the three parties as mentioned above, they are hardly able to agree on anything. They are litigating against each other in different cases, and they are not even able to agree on their own settlement agreement.

[23] There are allegations by the first applicant and the second applicant that the first respondent denies them access into farm Waterval, which is one of the prayers sought by the first and second applicants. There are however at least three copies of interim protection orders which were filed by the first respondent pertaining to alleged acts of domestic violence on her. There are no final protection orders that are filed, so the outcome of the said interim protection orders have not been brought to the attention of this court. There is a settlement agreement regarding acts of domestic violence, and it is not clear from the documents filed whether that was ever made an order of court or not.

[24] The first respondent on the prayer that the first and second applicants be allowed on farm Waterval, is not just barely coming before the court, but shows the court the history of allegations acts of domestic violence. I'm not saying that the first applicant and the second applicant perpetrated that, but I'm saying that I cannot just ignore that and allow the first applicant access to the farm with the picture of alleged acts of domestic violence that has been painted. However as per the settlement agreement of the first applicant and

the first respondent, the second applicant is entitled to half of the ownership of farm Waterval 1,2 and 3. I will therefore not make an order that he be denied access to his own farm, but the first applicant is not allowed access to farms Waterval 1,2 and 3, because of allegations of domestic violence which were supported by copies of three interim protection orders and two warrants of arrest which were filed.

[25] The second applicant as per the settlement agreement was to co-own the farm Waterval 1,2 and 3, with the first respondent. The first respondent intended transferring farm Waterval to A[…] S[...] Family Trust from Onverdient Proprietary Limited as per the 'instruction to invest trust moneys' which has been filed as Annexure 9. Her submission is that the transfer was not complete because the first and second applicants refused to sign as they are also the directors. The transfer therefore was therefore not complete. The second applicant as the co-owner of that farm is entitled to know as to what was happening in the farm since he left the farm. I therefore in my view finds that it is appropriate that an account of what happened on the farm be given to the second applicant, which means that prayer 4 succeeds.

[26] There is a dispute as to whether the first applicant has ceded to the first respondent his right to a loan that he granted the second respondent. The first respondent in reaction to that, filed what she termed 'an extract of the resolution for the Close Corporation Triple Option' dated 02/05/2016, in which it is alleged that the first applicant was present and he resigned from being a member of Triple Options and ceded his loan account to the first respondent. The first applicant denies that he signed the said resolution, and so is his son, and even sought the intervention of a forensic examiner, Mr Cecil Greenfield to examine resolutions marked '1','3' and '17', in trying to show the court that such documents were fraudulently obtained.

[27] There is clearly a dispute of fact on the issue of the cession of the loan account by the first applicant to the first respondent, and I find that this is an

issue that can be better dealt with if the matter is referred to trial. In *National Director of Public Prosecutions v* Zuma[6], it was well established that;" *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".* The Constitutional Court in *Mamadi and Another v Premier of Limpopo Province and Others*[7]*,* held that in motion proceedings the court may not in terms of its discretion under Rule (6) (5) (g), on the basis that the matter cannot be decided on affidavit, dismiss the matter without rendering a final decision.

[28] Prayer 9, which is an addition in the amended notice of motion filed on 25/01/2022, emanates from issues that are contained in prayer 6 pertaining to the loan account by the first applicant to the second respondent. For me to be able to refer the matter as per prayer 9, I must have made credibility findings on the allegations levelled against the first respondent. I'm unable to make credibility findings based on affidavits as presented before the court. Those findings will be better placed to deal with aspects raised in prayer 9. That aspect is also therefore referred to trial.

[29] Prayer 5 relates to the sale of a portion of land of the third applicant to one Koot van Staden. The said Koot van Staden and the first respondent are members of the second respondent, each holding 50% membership interest in that company. The contents of Annexure 'FA 11" attached to the Notice of Motion are very clear, and in my view needs no further interpretation. The first respondent admits that indeed an amount of R206 698- 94 was authorised for payment of the balance that was owed to the third applicant for the portion of land sold to Koot van Staden, but turns around and say that it is a private matter that doesn't concern the second respondent. She also raises the issue of prescription on that claim, and once there are such allegations, I cannot deal

[6] [2009] 2 All SA 243 (SCA).
[7] (CCT 176/2021) [2022) ZACC 26 (06 July 2022).

with the issue properly on affidavits. In terms of Rule 6(5)(g) of the Uniform Rules, I therefore refer this aspect to trial.

[30] I now deal with the issue pertaining to the nyalas on farm Waterval as per paragraph 3.1.1.4. of the settlement agreement of the first applicant and the first respondent. At the time when the parties entered into a settlement agreement regarding their divorce, each one of them had to take four bulls, and the remaining nyalas were to be shared between them. There is no number as to how many nyalas were there to share. In my view the literal interpretation of this clause is that whatever nyalas that remained were to be shared equally between them. I cannot therefore make an order with regard to the number of nyalas that have to be shared if I don't know as to how many nyalas are remaining in farm Waterval. In the result the order that I make with regard to the nyalas is that the first applicant and the first respondent must share equally the number of nyalas that are currently on farm Waterval.

[31] The common principle on a cost order is that it usually follows the result. There is no outright winner in this matter, because I made different findings on different issues, which will be clear on the orders that I'm going to make. This is a case in my view where each party should bear its own costs.

[32] In the result I make the following order:

(i) That the first respondent is ordered to sign all papers necessary and deliver to the first applicant all documents necessary to transfer all her shares in Onverdient (Pty) Ltd to the first applicant within 5 (five) days of service of this order on her, failing which the Sheriff is authorised and directed to sign the relevant documents on her behalf,

(ii) That the first respondent is ordered to sign all papers necessary to transfer half the ownership of farms Waterval, 1,2 and 3, Limpopo Province, to the second applicant within 5 (five) days of presentation to

her of the relevant documents by the applicants and/or their conveyancers' attorneys, failing which the sheriff is authorised and directed to sign the relevant documents on her behalf, subject to the approval by the Minister of Agriculture, Land Reform and Rural Development,

(iii) That the second applicant is allowed free access to farms Waterval, 1, 2 and 3, Limpopo Province,

(iv) That the first respondent accounts to the second applicant for the income of farms Waterval, 1,2 and 3 from date of divorce, being 17/02/2020 to date of court order, and to provide a statement and debate of account within 30 days of service of this order on her, and the first respondent is ordered to pay the second applicant his half share of any profits from the income of the running of farm Waterval 1,2 and 3, as determined out of the statement and debate of account,

(v) That the issue pertaining to the sale of land to Mr Koot van Staden, being the sum of R206 698-94, is referred to trial,

(vi) That the issue pertaining to the loan amount of R774 606-63 is referred to trial on the following terms:

(a) the notice of motion in the application shall stand as the applicants' combined summons,

(b) the founding affidavits (including the supplementary founding affidavit) shall stand as the applicants' particulars of claim,

(c) the respondents' answering affidavit shall stand as the respondents' plea,

(d) the replying affidavit of the first applicant and confirmatory affidavit of the second applicant shall stand as their replications,

(e) the further exchange of pleadings and pre-trial procedures, including discovery and the request for and provision of trial particulars, shall be regulated by the Uniform Rules of Court in respect of action proceedings. Discovery of documents not forming part of the application papers shall take place in accordance with the provisions of the Rules of Court,

(f) the provisions of Rule 28 with regard to amendment of pleadings and documents shall be applicable in the event either of the parties wishes to amend its papers.

(vii) That the issue pertaining to the rental amount of R742 500-00 has been dealt with by another court in a judgment that was handed down on 27/10/2019,

(viii) That the first applicant and first respondent are ordered to share equally the nyalas that are currently on farm Waterval 30 days from the date of this court order if any are available,

(ix) The issue pertaining to referral to the NDPP is referred to trial,

(x) That each party shall bear its own costs.

J.T. NGOBENI
Acting Judge of the High Court
Limpopo Division, Polokwane

Appearances

Counsel for the Applicants	: Mr A.S.M. van Jaarsveld
Instructed by	: Marinus van Jaarsveld Attorneys
1st Respondent	: In person
2nd Respondent	: Represented by 1st respondent
Date of the hearing	: 14 August 2023
Date of judgment	: 19 September 2023

Judgment transmitted electronically