

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

Case Number: 59537/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
DATE: 08/02/2023

L[....] M[....]

Applicant

and

D[....] J[....] S[....]

Respondent

JUDGMENT

SC VIVIAN AJ

1. The Applicant and the Respondent were in a romantic relationship. A child was born out of the romantic relationship between the parties. She is currently about 4½ years old.

2. In this application, the Applicant seeks to enforce what she contends are agreements in respect of the payment of maintenance and a motor vehicle.

3. The notice of motion seeks relief in respect of these agreements and contact rights. However, the parties have agreed on an interim order in respect of contact rights and for the matter to be referred to the family advocate.

4. It is generally desirable in motion proceedings for the application to be disposed of in a single hearing. The Court has an inherent power to separate issues in motion proceedings.¹ However, this power should be exercised with circumspection.² As this application concerns a minor child, the overriding concern is the best interests of the minor child.

5. I considered the proposed approach and the agreed part of the order, and am satisfied is in the best interests of the minor child for the separation to be granted and for the agreed part of the order to be made an order of court. This judgment accordingly concerns the question as to whether the alleged agreements in respect of maintenance and the motor vehicle have been proved and should be enforced. The order will provide for the further conduct of the matter.

6. I have concluded that the evidence shows that there was indeed an agreement in respect of maintenance. The “gift” in respect of the motor vehicle is not a donation but is a partial discharge by the Respondent of his maintenance obligations towards the minor child. The Respondent agreed to provide the motor vehicle to the Applicant for her use. He further agreed to pay a monetary contribution in respect of maintenance. The parties agreed to increase the amount of this contribution at the beginning of 2020 and again at the beginning of 2021.

Disputes of fact in motion proceedings

¹ Rule 33(4) is not applicable to motion proceedings. See Erasmus: Superior Court Practice, Second Ed., Vol. 2, page D1-436

² Louis Pasteur Holdings v ABSA 2019 (3) SA 97 (SCA) at para’s 32 and 33

7. The Respondent's counsel raised as a point *in limine* the submission that the institution of motion proceedings was an abuse of process because there are clear disputes of facts both in respect of the motor vehicle and in respect of maintenance, which disputes were known to the Applicant when she issued the proceedings.

8. There are numerous judgments dealing with disputes of fact in motion proceedings. Disputes of fact are resolved in terms of the Plascon-Evans rule³, which has itself been explained in a significant number of judgments.

9. Cameron JA (as he then was) summarised the position as follows:

"[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous Respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a Respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the Applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a Respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it

³ Deriving from the judgment of Corbett JA in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 to 635

can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.”⁴

10. In my view, a version is far-fetched and clearly untenable, and accordingly falls to be rejected, when it is in direct conflict with the objective evidence, such as contemporaneous emails and Whatsapp messages and the other common cause facts.

11. I have considered the submissions by the Respondent's counsel in respect of the disputes of fact. In my view, this matter can and should be decided on the affidavits.

The material facts

12. The Respondent purchased the motor vehicle in question in October 2018. The Respondent is not the owner of the motor vehicle. The motor vehicle was financed by a finance provider. Ownership of the motor vehicle vests in the finance provider. Ownership will be transferred to the Respondent when he has completed paying the instalments in terms of the finance agreement. The Respondent maintains insurance over the motor vehicle and pays the insurance premium.

13. The Respondent says that he purchased the vehicle “*for the use by the Applicant.*” According to the Respondent, he did not intend to gift or donate the motor vehicle to the Applicant. All that he did was allow the Applicant the use thereof.

14. The Respondent says that when their relationship ended, he agreed that the Applicant could continue using the motor vehicle. He said that he did not do this out of any largesse to the Applicant. He merely did it for convenience of the minor child.

15. The Respondent says that the motor vehicle was never intended as being a donation to the Applicant which was instead intended that she would have the right to limited use of the vehicle. He describes this as a “gift of use”.

⁴ Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)

16. In her founding affidavit, the Applicant relies on WhatsApp messages sent to her by the Respondent in respect of the motor vehicle. On 18 March 2021, the Respondent sent the following message:

*"I understand I said it was a gift to you". On 26 July 2021, the Respondent said:
"Please understand that I tried to give you a car. I'm not trying to take it away from you."*

17. Although the Respondent says that these messages are extracted in isolation from the preceding and following messages, he does not produce those messages. He also does not dispute that these messages were in respect of the motor vehicle.

18. In addition to providing the Applicant with the use of the motor vehicle, the Respondent also paid maintenance for the minor child to the Applicant. During the year 2020, he paid the sum of R3 995,00 per month. The Respondent's counsel confirmed during argument that this was pursuant to an agreement between the parties. She did so after taking an instruction from the Respondent, who was sitting next to her in Court. This concession was correctly made. The evidence is that after the Applicant requested the increase to R3 995,00 from the previous years' agreement, the Respondent sent a Whatsapp with the word "sure". He then paid the increased amount.

19. On 25 November 2020, the Applicant sent an email to the Respondent. She explained the cost of school fees for the following year and asked for a R500,00 increase on the agreed maintenance to R4 495,00 per month from the end of November 2020. The Respondent replied on the same day. He said they should discuss the issue once the school fees were confirmed.

20. On 9 December 2020, the Applicant sent a further email with the same request.

21. From January 2021 until June 2021, the Respondent duly paid the increased amount R4 495,00 per month. From the extracts from his bank statements produced

by the Respondent, he made payments at the end of every month. Practically, these payments must be intended for the next month.

22. On 15 April 2021, the Respondent sent an email to the Applicant in which he told her that he could not continue with his current cash and work constraints. He asked her to trade in the motor vehicle, failing which it would get repossessed. He also asked for a detailed income and expenditure for the child so that they could re-look at "*her payment*". In her replying email, the Applicant suggested that the Respondent seek debt relief from the finance provider for what she described as her car.

23. In July 2021, the Respondent unilaterally reduced his payment to R2 208,44 per month. It is not in dispute that the difference between the amount that he was paying in the preceding months and the reduced amount is the instalment on the motor vehicle. Accordingly, the Respondent effectively deducted the instalment from the maintenance payment.

24. He paid this amount for the months of July, August and September 2021, whereafter he reduced the payment further following correspondence sent by his attorney.

25. The Applicant says that the recent pandemic severely impacted his practice as an attorney. He says that his financial circumstances took a turn for the worst and explains that he defaulted on a payment for the motor vehicle as well as on his personal motor vehicle.

Was the 'gift' of the motor vehicle an executory donation?

26. During the course of oral argument, the Respondent's counsel referred me to two unreported judgments that were not referred to in her heads of argument. She referred to these in support of a submission that the 'gift' of the motor vehicle was an executory donation and accordingly had to comply with the provisions of Section 5 of the General law Amendment Act (Act 50 of 1956). Because the donation was not in writing, it is void.

27. I gave both counsel the opportunity to file short supplementary heads of argument on the issue, which they did. I am grateful to both counsel.

28. I have read the two case relied upon by the Respondent.⁵ In my view, both cases are distinguishable on the facts. In **Rousseau**, Justice Nobanda usefully explained the requirements of a donation during the lifetime of the donor (*donatio inter vivos*). She quoted from an earlier full bench decision in which van Zyl J explained: “*The donor's intention to make a donation (animus donandi) must arise from generosity (liberalitas) or liberality (munificentia) and be expressed as a promise (offer) to donate, which promise (offer) must be accepted by the donee before a binding contract of donation comes into existence.*”⁶

29. That judgment is consistent with the judgment of Marais JA in **Welch's Estate**.⁷ In that case, the learned Judge referred to the common law test as by van Zyl J.⁸ Having held that the requirement of pure liberality or disinterested benevolence was also a requirement in respect of Section 55(1) of the Income Tax Act (Act 58 of 1962), the learned Judge held that the requirement of pure liberality or disinterested benevolence was not met on the facts of that case.

30. Briefly, the facts in **Welch's Estate** were that shortly before his death, the late W and his wife were divorced. In terms of the consent paper signed by W, he agreed to pay maintenance to his wife and minor child. For this purpose, he was to set up a trust and transfer assets to that trust. The trust deed transferred the obligation to pay maintenance to the trust.

31. Marais JA held that the transfer of assets to the trust was not a donation because the primary purpose was to enable the trustees to satisfy the legal obligations imposed by W in terms of the consent order.⁹

⁵ *Rousseau v Lombard and Another* (M241/2019) [2020] ZANWHC 5 (30 January 2020); *McBride v Jooste and Another* (2014/03228) [2015] ZAGPJHC 20 (6 February 2015)

⁶ *Commissioner, South African Revenue Services v Marx* NO 2006 (4) SA 195 (C) at para 24

⁷ *Welch's Estate v Commissioner, South African Revenue Service* 2005 (4) SA 173 (SCA)

⁸ *Welch's Estate*, *supra* at para 23

⁹ *Welch's Estate*, *supra* at para 45

32. In this case, although both parties described the use of the motor vehicle as a gift it was, to use the words of the Applicant's counsel, a gift with a purpose. On the Respondent's own version, he purchased the vehicle so that the Applicant could use it to transport their child.

33. That is not a donation. It is part of the maintenance agreed between the parties.

34. The only factual issue in dispute is whether the Respondent only agreed to provide the vehicle for the Applicant's use or whether he agreed that, once he acquires ownership of the vehicle, he will transfer that ownership to the Applicant.

Analysis of the facts

35. The Respondent has a duty to provide maintenance for the minor child. He admits this obligation. On the common cause facts, he has been providing maintenance for the minor child since she was born.

36. He acquired the motor vehicle solely for use by the Respondent because she needs to transport the minor child. Had he not done so, he would have needed to pay an increased cash amount for maintenance.

37. The Respondent admits that his intention was that the Applicant should have the use of the motor vehicle. This is an indefinite commitment that should be viewed as part of his maintenance contribution. In order to provide this use, the Applicant at least tacitly agreed to pay the monthly instalments to the finance provider and to continue to pay the insurance for the vehicle.

38. There is no evidence that the parties discussed or contemplated what would happen once the finance provider had been paid in full and the Respondent became the owner of the vehicle. In my view, the Applicant has failed to establish that the Respondent undertook to transfer ownership of the motor vehicle to her.

39. In my view, as between the Applicant and the Respondent, it is irrelevant whether the Respondent is the owner of the vehicle or is still paying instalments to

the finance provider. The Applicant remains entitled to the use of the motor vehicle. The Respondent must do what is necessary to secure that use. This means that, for so long as he remains indebted to the finance provider, he must continue to pay the instalments. Moreover, even once he is no longer indebted to the finance provider, he must continue to pay the insurance premiums as per his undertaking. The Respondent is, however, not obliged to transfer ownership of the motor vehicle to the Applicant.

40. In respect of the monetary component, the Respondent admits that he agreed to pay R3 995,00 per month during 2020 and paid this amount. He denies that he agreed to pay the increased amount from January 2021. Even if I accepted this denial, this would mean that the previous agreement remained in place and he would be obliged to pay R3 995,00 per month.

41. On a conspectus of the evidence, however, the Respondent's denial that he agreed to pay the increased amount of R4 495,00 per month is untenable. It is an objective fact that the Applicant twice asked him to pay the increased amount because of the school fees that would need to be paid in 2021. It is an objective fact that he then paid the increased amount in January, February, March, April, May and June 2021.

42. There is no evidence that the Respondent recorded that he was paying the increased amount under protest. In the circumstances, his conduct in making the payments exactly in accordance with the request leads to the inevitable inference that he agreed to pay the increased amount. This constitutes tacit acceptance.¹⁰

43. In any event, this is a case where the Respondent's silence leads to the inference that he accepted the request for to increase maintenance. The question as to whether silence in the face of an offer – in this case the request to increase maintenance – amounts to acceptance is a fact based question. The question is

¹⁰ Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) at 429 to 430

whether, on the application of logical reasoning to the facts, the most probable inference is that the offer was accepted.¹¹

44. On these facts, we have more than just silence. First, there was already an agreement in place. The question was really one of variation of the agreement. Second, we have the initial response which is to wait until school fees are finalised. Third, we then have payment of the amount requested. Fourth, we have the Respondent's conduct in July 2021 when he unilaterally reduced the payment by the exact amount of the motor vehicle instalment.

45. In these circumstances, the most probable inference is that the Respondent accepted the offer.

46. The Respondent's counsel submitted that the Applicant had not proved her case in terms of the founding affidavit. In the founding affidavit, the Applicant said that maintenance had been orally agreed. In reply, the Applicant suggested that the agreement was tacit.

47. In my view, this is too narrow a view of the matter. The Applicant alleged an agreement. The facts reveal an agreement. Whether the acceptance of her request to increase maintenance was oral or tacit is neither here nor there.

48. It is apparent that the Respondent later found that his financial position had altered. That was when he first tried to find solutions – asking the Applicant to trade the motor vehicle in or obtain alternative financing and then, in July 2021, unilaterally reducing the payments.

49. His initial reduction of the monthly payment – by deducting the exact amount of the instalment on the motor vehicle – is further evidence that, by July 2021, he accepted that the agreed monthly maintenance was R4 995,00. What he was trying to do was to avoid the other part of the agreement, namely the provision of the motor vehicle for the Applicant's use.

¹¹ Venfin Investments (Pty) Ltd v KZN Resins (Pty) Ltd t/a KZN Resins [2011] 4 All SA 369 (SCA) at para 24

50. The Respondent was not entitled to do so. Having agreed to maintenance, including the use of the motor vehicle, if he wanted to reduce his contribution he needed to either reach agreement with the Applicant or approach the Maintenance Court. He did neither.

51. I accordingly find that the Respondent indeed agreed to increase maintenance to R4 995,00.

52. However, I do not accept that the Respondent agreed to increase maintenance on an annual basis by 10% as alleged by the Applicant. The facts show the contrary. The increase at the beginning of 2020 was not by 10% and followed an express request by the Applicant and acceptance by the Respondent. Similarly, the increase at the beginning of 2021 was not by 10% and followed an express request by the Applicant and, as I have found above, acceptance by the Respondent.

53. I am aware that inflation is a fact of life. However, the Applicant has asked this Court to simply enforce the agreement. If she requires increased maintenance, she must either seek to reach agreement with the Respondent or approach the Maintenance Court.

Conclusion

54. Accordingly, I find that the Applicant is entitled to orders enforcing the agreements in respect of maintenance, including for the use of the motor vehicle.

55. The Respondent's counsel referred me to a with prejudice tender made by the Respondent and uploaded to Caselines. The tender purports to be in terms of Rule 34, but does not comply with the terms of that rule. In any event, the relief that I propose to award exceeds what was tendered. Notably, the tender did not incorporate a tender for costs.

56. In the circumstances, the Respondent must pay the costs of this part of the application.

57. I accordingly make the following order:

57.1. The Respondent is ordered to take all steps necessary to ensure that the Applicant has full use of the Suzuki D' Zire 2018 model motor vehicle with registration number and letters [...].

57.2. Without derogating from the generality of the foregoing, the Respondent is ordered to make timeous payment of all instalments due to the finance provider from whom he acquired the said motor vehicle and to maintain adequate insurance in respect of the motor vehicle, including timeously paying insurance premiums to the insurer.

57.3. The Respondent is ordered to make payment to the Applicant of the sum of R4 495,00 per month, which payment is to be made in advance in respect of the next month on or before the last day of every month.

57.4. The Respondent is ordered to pay all arrear maintenance as per paragraph 57.3, together with interest thereon at the rate of 10,5% *per annum* from due date until date of payment, within 30 days after the granting of this order.

57.5. The office of the Family Advocate is requested to investigate the best interests of the minor child and to make a recommendation regarding her exercise of contact with the Respondent.

57.6. Pending investigations by the office of the Family Advocate the primary residence of the minor child will be with the Applicant and the Respondent shall exercise the followings rights of contact:

57.6.1. every alternative Saturday on which days the Respondent shall collect the minor child at the Applicant's residence at 08:00 and return the minor child no later than 14:00; and

57.6.2. reasonable telephonic contact.

57.7. The application is postponed *sine die* pending receipt of the report from the Office of the Family Advocate.

57.8. The Applicant is granted leave to file a supplementary affidavit within 15 days after the said report is received. The Respondent is granted leave to file a supplementary affidavit in response within 10 days after the Applicant has supplemented her papers, or, if the Applicant fails to supplement her papers, within 25 days after the said report is received. The application may thereafter be re-enrolled.

57.9. The Respondent is ordered to pay the costs of the hearing of this part of the application.

Vivian, AJ

Acting Judge of the Gauteng Division of the High Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

instructed by:

L van der Westhuizen

Barnard Incorporated

FOR THE RESPONDENT:

Instructed by:

G Kyriazis

Cowen Harper Madikizela Attorneys