



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 1880/2025

In the matter between

JEANNE-MARIE KÖRBER

FIRST APPLICANT

RAINER RUDI KÖRBER

SECOND APPLICANT

and

**CALLAGRO PROPRIETRY LIMITED t/a
CALLAHO WARBLOOD SPORT HORSE STUD**

FIRST RESPONDENT

IAN MEIRING CALLENDER-EASBY

SECOND RESPONDENT

Neutral citation: *J Körber and Another v Callagro Propriety Limited t/a Callaho Warmblood Sport Horse Stud and Another* (1880/2025) [2025] ZAFSHC 287 (11 September 2025)

Coram: Van Rhyn J

Heard: 14 August 2025

Delivered: 11 September 2025

Summary: Application for final order for the return of possession of broodmare horse-purchased by first applicant from first respondent – respondents oppose relief claimed – on basis of exclusive breeding rights and right of possession in terms of agreement. Dispute of fact as to contractual rights to retain possession of horse and whether breeding rights are exclusive or not. Dispute of fact foreseeable – principles restated.

ORDER

The application is dismissed with costs on a party and party scale, which costs includes costs of counsel on Scale B

JUDGMENT

Van Rhyn J

[1] The applicants, Jeanne-Marie Körber, cited as the first applicant and her husband, Rainer Rudi Körber, cited as the second applicant, seek the return of possession of a broodmare horse with the name Fiorella, which horse is in the possession of the first respondent, Callagro (Pty) Limited t/a Callaho Warmblood Sport Horse Stud (Callaho) situated at Farm Vaallaagte, Free State Province (the Callaho farm). Callaho is an established Warmblood Stud, dedicated to breeding world-class sport horses in showjumping, dressage and eventing. The second respondent is Ian Callender-Easby, a businessman and sole director of Callaho. The first and second applicants are both professional equestrians.

[2] It is common cause that the first applicant purchased Fiorella from Callaho at an auction hosted by Callaho on 30 June 2012. All patrons attending the auction were furnished with a catalogue. The written, express terms and conditions of sale are recorded in the catalogue. Prior to the commencement of the auction the first applicant expressed her interest and intention to purchase Fiorella to the second respondent and indicated that she was concerned that she might not have the financial ability to pay for Fiorella as she had a budget of approximately R200 000 to R250 000 and furthermore did not have immediate access to these funds. According to the first applicant, the second respondent proposed that she should bid on Fiorella until 'the hammer fell' and in the event that the price exceeded her budget, the second respondent would discount the difference between the sale price and the first applicant's budget in exchange for the right to breed

with Fiorella in future.

[3] At the auction, the hammer fell at R285 000. After addition of insurance, auctioneer's commission and VAT, the total purchase price for Fiorella was R334 647. Payment of an amount of R 234 252.90 was made by the first and second applicants in three tranches with the last amount paid on 26 September 2012. In exchange for breeding rights in Fiorella, the second respondent agreed to a discount of 30% on the price of R285 000. On 30 June 2012 the second respondent handed Fiorella's 'Hannover Verband horse passport' and a certificate of ownership over to the applicants. After the auction, the applicants removed Fiorella from the Callaho farm situated near Christiana and took her to their premises situated at Johannesburg where she was trained to compete as a showjumper up to national level.

[4] Fiorella remained in possession of the applicants and under their care and tutelage until January 2020, aged 12 years, when she suffered a career ending injury and was subsequently retired from further showjumping events. During the beginning of January 2020, Fiorella was transported to the Callaho farm for the purposes of breeding. In the 13 years since the applicants became the owners, Callaho has used Fiorella for breeding and a number of foals were born. Almost five years later, on 29 November 2024, the applicants emailed the second respondent to confirm their intention to collect Fiorella from the Callaho farm on 5 December 2024, in accordance with their agreement. They further stated that they would accept the foal Fiorella currently has with her as the offered breeding foal. An instruction was furthermore given that further breeding with Fiorella is suspended. Subsequent to the exchange of correspondence between the parties, and thereafter also between the attorneys acting on behalf of the parties, the applicants issued the application on 11 April 2025 in terms whereof the following relief is sought:

'1. The First Respondent is ordered immediately to return possession of the horse Fiorella to the Applicants.

2. That on a date to be determined by the above Honourable Court, the First Respondent is ordered to permit the Applicants, or their duly authorized representatives, entry and egress to the First Respondent's property, situated at Farm Vaallaagte, S408, Northern Cape, South Africa, which access and egress is to include that a vehicle, a horsebox and all necessary personnel, in order to facilitate the return to them possession of their horse Fiorella.

3. Costs of the application on scale C.'

[5] The respondents' response to the claim for the return of possession of Fiorella to the applicants, is that, although it is common cause that the first applicant is the owner of Fiorella and that Fiorella is in Callaho's possession, the reason for Callaho's possession stems from the agreement in respect of which the first applicant purchased Fiorella and whereby Callaho will have exclusive breeding rights in Fiorella for the duration of her fertile lifespan. According to Callaho, the fact that it retained exclusive breeding rights in respect of Fiorella and as a result, being entitled to remain in possession of her for the duration of her fertile lifespan, was never in dispute prior to the issues that surfaced after a 20-year relationship between Callaho and the second respondent on the one hand and the applicants on the other hand. The relationship, which was both a longstanding personal and business relationship, became acrimonious during or about September 2024 when the applicants raised various claims against Callaho in respect of several agreements concluded between the parties and which also include other horses and dealings.

[6] At the hearing of the matter, Mr Berkowitz, counsel for the applicants argued that a calculated risk was embarked upon in deciding to proceed by way of motion procedure on the basis that the dispute concerns only a 'crisp or narrow' one. The applicants dispute that it was a term of the agreement, concluded in the partly written, partly oral agreement during 2012, that Callaho became entitled to exclusive breeding rights in Fiorella for the duration of her fertile life. The contention by the applicants is in any event that the issue whether Callaho is entitled to exclusive breeding rights is not relevant for the purposes of this application. To the extent that Callaho can prove that it obtained exclusive breeding rights, the applicants contend that this can be achieved, as it has been in the past, through the extraction of embryos from Fiorella, implanted into and carried to term by a surrogate broodmare. Callaho would not need to retain possession of Fiorella to execute its breeding rights. In any event, so the argument goes, the first applicant is the rightful owner of Fiorella and the decision to breed with Fiorella lay squarely with the first applicant.

[7] The parties are *ad idem* that for now, the fertile lifespan of Fiorella has not come to an end and according to Callaho, a further four to six years still remain during which Callaho will be able to breed with Fiorella. Ms Kriek, on behalf of the respondents, argued

that there exists a dispute of fact as to the contractual right on which Callaho relies as a defence to the relief sought by the applicants, and that the court, in adopting a robust, common sense approach, is in the position to settle such dispute of fact on the probabilities emerging from the affidavits, which can only, premised on the objective facts, lead to the dismissal of the application. In the event that the court is unable to come to a decision on the affidavits as a result of the dispute of fact, the matter equally falls to be dismissed on the basis that the material dispute of fact was foreseeable, alternatively, the matter must be referred for the hearing of oral evidence.

[8] Rule 6(5)(g) of the Uniform Rules of Court provides:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to 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 him 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.'

[9] In *National Director of Public Prosecutions v Zuma*¹ the court held as follows:

'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 affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order.'²

[10] The criterion to be utilised in arriving at a decision whether to proceed by way of action or motion proceedings is whether or not there is any real dispute between the parties on any material question of fact. If there is such dispute, then it is necessary to proceed by way of action in order to properly test and challenge the evidence. This is because it will be necessary for the parties to lead evidence of witnesses and for such witnesses to be cross-examined to enable the court to decide whose version is the more

¹ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA).

² *Ibid* para 26.

probable. Whether or not a real dispute of fact exists is not always easy to determine. However, in practice, very few matters proceed without some sort of interchange between the parties and correspondence exchanged between their legal representatives prior to litigation steps ensuing. In this way the applicant will have some idea of the opponent's case as a result.

[11] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,³ Murray AJP pointed to a number of different ways in which a dispute of fact may arise:

'The clearest instance, is of course, (a) when the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by the deponents or witnesses to the contrary.'⁴

Further:

'The respondent may (b) admit the applicant's affidavit evidence but allege other facts which the applicant disputes. Or (c) he may concede that he has no knowledge of the main facts stated by the applicant, but may deny them, putting applicant to the proof and himself giving or proposing to give evidence to show that the applicant and his deponents are biassed and untruthful or otherwise unreliable, and that certain facts upon which applicant and his deponents rely to prove the main facts are untrue.'⁵

This is what one will normally consider to be a dispute of fact: a simple case of two differing versions. The application may be dismissed with costs when the applicant should have realised when launching the application that a serious dispute of fact was bound to develop.

[12] During argument, Mr Berkowitz conceded that whether or not exclusive breeding rights in respect of Fiorella was indeed awarded to Callaho and the question whether Callaho was entitled to retain possession of Fiorella for the rest of her fertile lifespan will depend on the terms of the agreement concluded between the first applicant and the second respondent, who represented the first respondent. In order for the applicants to obtain the relief prayed for in the notice of motion, the applicants must prove that they are entitled to possession of Fiorella and deny Callaho from continuing with exclusive breeding rights, which, it is common cause was the situation until the hearing of this application.

³ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

⁴ *Ibid* at 1162.

⁵ *Ibid*.

[13] The applicants raised the issue of breeding rights regarding Fiorella in correspondence addressed by the applicants' attorney to the second respondent dated 11 December 2024 in which the following was stated:

'5. We are instructed that the issue relating to Fiorella needs to be prioritized. It is common cause that Fiorella was purchased at a discount, that Rainer Korber is the registered owner of the horse and that you had breeding rights and that you indeed bred with the horse successfully and to your financial benefit. It would appear from your correspondence that you contend that you had exclusive breeding rights and imply that such exclusive breeding rights would endure for the fertile life of Fiorella. Our clients deny that you are entitled to exclusive breeding rights for the fertile life of Fiorella. The exclusive breeding rights for the fertile life of Fiorella cannot be the compensation for the discount on the purchase price so many years ago especially when our client is the owner and you have already had substantial benefit from her, far exceeding the discount. Our client is, in the circumstances, entitled to terminate *your right to continue exclusive breeding rights*. We also place on record that by agreement with you, our client is entitled to a foal from Fiorella. We are instructed that this is also common cause. Our clients, accordingly, require the return of Fiorella. We are instructed that Fiorella has a foal at present and that they should nevertheless not be separated.' (My Emphasis.)

[14] In response, the attorneys acting on behalf of the respondents replied on 30 January 2025 as follows:

'Way forward. As discussed, and as alluded to herein above, it appears from the documentation in my possession that there is a huge dispute of fact. As much as the matter is not capable of being settled, action will need to be instituted for the matter to run its course to trial.'

In a letter by the respondents' attorney addressed to the applicants' attorney, it is clearly stated that having regard to the correspondence and documentation exchanged between the parties since the beginning of June 2024, it is evident that there is a dispute of fact pertaining to the breeding rights in Fiorella and whether such breeding rights are exclusive as contended by the respondents and that the respondents are entitled to the possession of Fiorella until the expiry of her fertile life.

[15] What can furthermore be ascertained from the correspondence exchanged prior to the issuing of the application is the fact that the respondents made it clear that the ownership of Fiorella is not in dispute, or at least that the respondents are not the owners of Fiorella. The first applicant contends that she and her husband are the joint owners

whereas their attorney, in the correspondence, indicated that the second applicant is the owner of Fiorella. According to the respondents, the first applicant is the owner of Fiorella.

[16] Apart from the uncertainty regarding the ownership of Fiorella, the issue of jurisdiction was also dealt with at the commencement of the hearing of the matter. In this regard the applicants contended that the Free State Division of the High Court has the necessary jurisdiction due to the fact that the Callaho farm is situated in the Northern Cape Province and Fiorella is in the possession of Callaho. When this contradiction was raised by the court the applicants, both being present at the hearing, proposed that the matter stand down to enable them to address this patent error in the founding affidavit by way of a supplementary affidavit. The parties are *ad idem* that the Callaho farm where Fiorella is kept, is actually situated within the Free State Province and not in the Northern Cape Province. A supplementary affidavit was submitted, by agreement between the parties, to explain the correct position which resolved the issue regarding this court's jurisdiction to hear the application.

[17] The respondents fully dealt with the exchange of correspondence between the attorney's acting on behalf of the parties, which are attached to the founding papers as annexures, in the answering affidavit and during argument. The respondents, *inter alia*, referred to the contents of a letter addressed to the respondents' attorney dated 13 February 2025, where the following is stated in paras 22-23:

'To the extent that your client persists with the assertion that it was a term of the oral agreement of sale that, in return for the discount on the sale price, it was entitled to exclusive breeding rights to Fiorella to the complete exclusion of our clients' right to any breeding rights, this appears to be the sole basis upon which your client alleges that there is a *huge dispute of fact*. Our client disputes that this term was ever agreed to much less even contemplated.'

And further:

'26. Your client's contention that in exchange for a discount on the purchase price it procured exclusive breeding rights for the fertile life of Fiorella is the crux of this dispute.

27. Our clients would not and did not agree substantially and materially to limit their ownership of Fiorella by completely excluding their own right to extend her bloodline by breeding her foals. To have done so would have been commercially irrational.'

[18] It is common cause that since the career ending injury suffered by Fiorella, she

was returned to the Callaho farm during 2020 and, to the exclusion of others, Callaho bred with her. Since Fiorella's return to the Callaho farm, there was no demand for the delivery of a foal nor for the return of Fiorella to the applicants in Gauteng. In the founding affidavit, the first applicant indicated that despite the second applicant's dedication to training, he had developed aspirations to focus more on his personal riding goals which had taken a backseat due to his commitment to instructing and training horses not owned by him and the first applicant's stable, Körber Equestrian. Training, however, remained his primary source of income. During June 2024, the second applicant arranged a meeting with the second respondent to discuss his financial difficulties and professional strains due to travel demands from Gauteng to the Callaho farm. Despite the longstanding and mutually beneficial relationship with Callaho and the second respondent, tension began to emerge due to the second applicant's riding ambitions and his role as instructor for Callaho, and, according to the first applicant, her husband's need for the second respondent to offer greater financial support to make it feasible.

[19] Only after the relationship between the parties became acrimonious due to the second applicant's financial difficulties did the issue regarding the possession and breeding rights of Fiorella emerge in June 2024. There exists a dispute of fact as to the contractual rights on which Callaho relies as a defence to the relief sought by the applicants. A defence available to a respondent in a claim under the *rei vindicatio* is a superior right to possession or occupation (*ius possidendi*) in terms of a contract such as a pledge, usufruct, lease, an enrichment lien or some other right to be in possession of the property. Should the respondent wish to rely on a right to possession, the respondent must allege and prove the right.⁶

[20] In the answering affidavit it is contended that Callaho only allowed the first applicant to purchase Fiorella on the terms as agreed, if it could secure exclusive breeding rights to its benefit. In the event that the first applicant was not amenable to this term when the purchase and sale of Fiorella was negotiated during 2012, to grant to Callaho exclusive breeding rights, the sale would never have happened. In reply, this allegation is admitted by the first applicant. The respondents explain why it was beneficial to the applicants to grant exclusive breeding rights in respect of Fiorella when the sale

⁶ *Woerman NO v Masondo* [2002] 2 All SA 53 (A); 2002 (1) SA 811 (SCA).

was negotiated. The relationship between the parties emanates as far back as 2004 when the second applicant became a professional rider for Callaho. Since 2004 the second applicant competed with and trained many of Callaho's horses and was listed on the Callaho's website as a member of the Callaho team. Callaho contracts a number of professional riders and the riders stable and train the Callaho bred horses and use these horses to participate in sporting events such as showjumping and dressage. The rider will have a constant supply of horses bred by Callaho without having to bear the financial burden of purchasing the horses.

[21] The rider will compete with a showjumping horse, showcasing the rider's own unique skills as a competitor. The benefit to Callaho, in turn, is that the mare or stallion, being trained and exposed to high level competition, is fully evaluated as a future breeding prospect for the stud farm. It is explained by the respondents that a rider such as the second applicant may have up to eight horses to train and compete with. Having Callaho-bred horses successfully competing at higher levels, has, furthermore, substantial marketing benefits and exposure for both the professional rider and the stud farm, in this case, Callaho.

[22] In reply, the applicants, apart from denying that the second applicant had more than three Callaho-owned horses of his choice, stated that the further allegations were irrelevant to the adjudication of this application. The respondents further contend that a breeding arrangement concerning a broodmare owned by the first applicant was not isolated to Fiorella. Such an agreement also included a broodmare called Piccadilly Z owned by the first applicant. An agreement was concluded between Callaho and the first applicant during December 2016 in terms whereof Callaho would take possession of Piccadilly Z and retain her at the stud farm, thereby taking responsibility for her maintenance, health, care and upkeep, which would include the payment for all veterinary expenses. In accordance with the agreement, Callaho took possession of Piccadilly Z and incorporated her into the breeding programme. Callaho thereafter bred with Piccadilly Z to the exclusion of any other person for the duration of Piccadilly Z's fertile lifespan, which came to an end during June 2024. During August 2024, Piccadilly Z was delivered to the applicants. In reply, the applicants merely stated that the contents of the paragraphs dealing with Piccadilly Z were entirely irrelevant to this application. Strangely, in the

replying affidavit the following remark is made: 'There was never any question that Callaho would not have exclusive breeding rights.'

[23] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁷ it is stated:

'Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict together with ancillary relief, on the papers and without resort to oral evidence. In such case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G, to be: "... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order ... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.'"⁸

A failure to heed this basic proposition can (and generally should) result in the application being refused when the disputes of fact on material issues were foreseeable.

[24] The respondents clearly raised the issue of a 'huge dispute of fact' prior to the issuing of the application by the applicants. To my mind the respondents seriously and unambiguously addressed the issues in dispute, also in the correspondence exchanged between the attorneys. The respondents specifically referred to the need to proceed by way of action proceedings due to the 'huge dispute of fact' pertaining to the exclusive breeding rights and possession of Fiorella for the duration of her fertile life span.

[25] Whenever a genuine dispute arises in the affidavits about a material fact, the court may deal with the matter in terms of its discretion in various ways. The emphasis here is that the decision whether to refer to oral evidence or dismiss is in the court's discretion. However, the applicants did not ask that the matter be referred to oral evidence or to trial. If the dispute of fact is genuine and is of such a nature that it cannot be satisfactorily determined without the advantage of oral evidence, which affords the opportunity of estimating the credibility of witnesses, and observing their demeanour, it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed by the affidavit evidence. If the dispute of fact should have been foreseen by the applicant, the court may dismiss the application.

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁸ *Ibid* at 634E-F.

[26] On the papers before me, there is more than a mere denial of the averments made by the applicants. I have the responsibility to avoid fastidiousness and to make a robust approach to the matter at hand and to apply as much common sense to the issues raised by the parties as is possible. I am not persuaded that the averment by Callaho that the agreement included exclusive breeding rights as well as keeping Fiorella at the Callaho farm until the expiry of her fertile life is merely an attempt to delay the matter. It will suffice to say that I do not know who is telling the truth regarding the terms of the agreement concluded during 2012. The applicants therefore, cannot succeed. It is a well-established rule of practice that the dismissal of the application with costs is the proper course to follow if the applicant knew or should have known before the proceedings were instituted, that there was likely to be a dispute of fact which the court would not be able to resolve on affidavit. This situation could have been averted by the applicants if they proceeding by way of action.

[27] Costs on an attorney and client scale are sought by the respondents upon the dismissal of the application, either on the merits or on the basis that a dispute of fact was foreseeable in that the conduct of the applicants amounts to an abuse of the process of court. The award of costs is a matter of judicial discretion by the court. An award of attorney-and-client costs will not be awarded lightly as the court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain judicial decision on any complaint such a person may have.⁹ Having regard to the circumstances of this matter, I am not convinced that any vexatious, nor dishonest, fraudulent or *mala fide* conduct has been displayed. The decision to proceed by way of motion proceedings when it ought to have been clear to the applicants and their legal representatives that a dispute of fact was bound to emerge does not, per se, warrant a punitive cost order.

[28] In the result the following order is made:

The application is dismissed with costs on party and party scale, which costs shall include counsel fees on Scale B.

⁹ *Pienaar v Boland Bank and Another* 1986 (4) SA 102 (O) at 116B-C and 117A-C.



IVAN RHYN
JUDGE OF THE HIGH COURT

Appearances

For the Applicants:

A Berkowitz

Instructed by:

Lovius Block Attorneys
Bloemfontein

For the Respondents:

R Kriek

Instructed by:

Symington & De Kok Attorneys
Bloemfontein