



Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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

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| | Y E S / N O |
| Reportable: Of Interest to other Judges: Circulate to Magistrates : | Y E S / N O |
| | Y E S / N O |

Case No: 4587/2020

In the matter between:

SHERIFF, BLOEMFONTEIN WEST

Applicant

and

CAROSPAN (PTY) LTD t/a NASHUA BLOEMFONTEIN

First Claimant

EILEEN JOUBERT

Second Claimant

CORAM: HEFER AJ

HEARD ON: 1 DECEMBER 2023

DELIVERED ON: 30 JANUARY 2024

[1] Pursuant to First Claimant obtaining a default judgment against, *inter alia*, Mr John Joubert during March 2022, a warrant of execution was issued against Mr Joubert. The Applicant proceeded to attempt to execute the warrant of execution at the residence of Mr and Mrs Joubert situated at 63-[...] K[...]ommandant-Senekal Street, Bloemfontein, without success. It appears from the return of service by the Applicant, that Mr Joubert did not react to

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messages left at such place of residence by the Applicant requesting him to contact the offices of the Applicant. This was during May and June 2022.

[2] On the 21st of August 2023, the Applicant succeeded in executing the warrant of execution at the said property and attached certain movable assets as per the inventory to the applicable return of service. Save for a Jeep Grand Cherokee motor vehicle, the movables attached consist mainly of domestic furniture and appliances.

[3] Pursuant to the attachment and removal of such movables, First Claimant's attorneys of record received a certificate of registration in respect of the Jeep Grand Cherokee from which it appears that the owner thereof is the Second Claimant, Mrs E M Joubert.

[4] First Claimant's claim is therefore based only on the remainder of the assets as contained in the inventory, excluding the Jeep Vehicle.

[5] In an affidavit delivered by Second Claimant during April 2022, she stated that the immovable property, situated at [...]63 K[...]ommandant Senekal Street, Bloemfontein, was inherited by her from her grandfather Frederick Siebert. In this respect she referred to her grandfather's Last Will and Testament which

was attached to the affidavit. It indeed appears from the contents of this Will, that the immovable property concerned, was bequeathed to the Second Claimant. In this respect it was an expressed condition of the Will that the remainder of the Late Mr Siebert's estate was to be divided in three equal portions and that the immovable property concerned was then to be added to the portion bequeathed to Mrs Joubert.

[6] The Will then further contains a somewhat confusing clause to the effect that the testator, being the Late Mr Siebert, then further bequeathed the remainder of his estate in equal portions to his grandchildren, Frederick Siebert and to Mrs Joubert.

[7] Mrs Joubert deposed to an affidavit on 19 April 2022. In the affidavit, Mrs Joubert declared that she is the sole owner of the property situated at K[...]~~ommandant Senekal~~ Street as well as the contents thereof. She further declared that her mother is staying with her in a flat apparently on the property concerned and that the contents of the flat is the sole property of her mother.

[8] In an affidavit deposed to by Mrs Aletta Siebert, the mother of Mrs Joubert, she further declared in relation to Second Claimant:

“I further confirm that the contents of her house is also her sole property, except from(sic) the furniture in the flat that I am occupying which is my own.”

[9] In an affidavit by Mr Joubert, deposed to on the same date, he states as follows:

“I confirm under oath that the property where we are staying belongs to my wife as she inherit (sic) same from grandfather. She also inherited the furniture. As my mother-in-law is staying with us in a flat, only the furniture in her flat, is not my wife’s property. This belongs to my mother-in-law.”

[10] In its Particulars of Claim, the First Claimant pointed out that the inventory contains 48 assets that were attached and that the Second Claimant failed to specify in her initial affidavit which furniture / contents in the property she owns. However, one should keep in mind that the initial affidavit was already deposed to during April 2022, which is 16 months prior to the Sheriff attaching the movable assets. One can assume that the three affidavits deposed to on the same date were in an attempt to safeguard the relevant assets after the default judgment in the amount of approximately **R2.8 million** had been granted.

[11] In Mr Joubert's affidavit deposed to at the time, he further declared as follows:

"I own a property No. 7[...]H[...]#I#versum which is situated next to the Mud River at Maselspoort. My personal belongings and furniture were utilised in this river property.

I sold this property approximately two years ago with the content."

[12] In the latter regard, however, First Claimant referred to a sworn affidavit by Mr Michael Walker deposed to on 6 October 2023, in which he declared as follows:

"I confirm that I purchased a property during 2020 from Mr John David Joubert.

The property is known as No. [...]7 H[...]#I#versum and is situated next to the Modderrivier at Maselspoort, Free State. The purchase price of the property was R3 800 000.00.

I confirm that when I purchased the property, there was no furniture and/or any movable property of Mr Joubert sold with the property and the property was empty when I moved in."

Of significance is that this affidavit was deposed to and Second Claimant's attorney had been placed in possession thereof together with First Claimant's affidavit on the 3rd of November 2023, prior to the Second Claimant particulars of claim.

[13] In a copy of the Offer to Purchase which was also provided by the First Claimant, it appears that the said Mr Walker was indeed the purchaser of the property situated next to the Modder River.

[14] In this document, no reference is made to the movable property forming part of the sale.

[15] Based on the above facts, First Claimant asks that it must be presumed that Mr Joubert's personal belongings and furniture were kept in the property to be regarded as his place of residence and are the assets as contained in the Sheriff's inventory.

[16] In the Second Claimant's Particulars of Claim dated 23 November 2023, Second Claimant declared *inter alia* as follows:

(i) She and her husband were married out of community of property during November 2000. As both parties were business people, they decided to marry out of community of property.

(ii) She inherited the property they reside in from her grandfather. It was fully furnished when she inherited it.

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- (iii) Mr Joubert moved into her house and they made a living from their separate businesses.
- (iv) As Mr Joubert was extremely busy with his business, she ran the household. She further states that she was then 26 years old when they were married and has always been independent of Mr Joubert as she earned her own income and she inherited well from her grandfather. In this regard she referred to the contents of the Antenuptial Contract from which it appears that for purposes of accrual, Mr Joubert declared household and furniture to the value of R80,000.00 whilst the value of her movable property amounted to R100,000.00.
- (v) Then she declares as follows:

“During the 22 years many of the property was replaced due to normal wear and tear and daily living.

As my house was fully furnished, we did not have a need for most (own emphasis) of the Second Defendant’s property.

The Second Defendant leased a river house some times in the early 2000. I cannot recall the exact year and we used most of his furniture to furnish that river house.”

On the version of the Second Claimant therefore she indicated that the many of the items had been replaced over the years.

- (vi) She then continues to state that during the late 2000s Mr Joubert gave the river property to his sister who was in dire financial need. The property was, according to her, given to Mr Joubert's sister with the furniture that belonged to Mr Joubert. She further states that Mr Joubert then bought a new property on the "Mud River". The remainder of Mr Joubert's furniture was then moved to the second river property. She further states that Mr Joubert sold his furniture when he sold his immovable property, being the river house, before he was sequestered.

- (vii) According to Second Claimant, she took a bond over her property during 2007 and refurbished the house. She alleges that she bought many of the movable assets with the bond money and the intention was to upgrade and refurbish the house.

[17] The Second Claimant then continued in her claim to deal with each asset as it was contained in the warrant of execution with the inventory. In this regard she stated further:

“The Honourable Court will understand that I am not able to provide receipts for the assets as it was bought a long time ago, and I inherited many of the assets.

My mother lives in a granny flat attached to our house and some of the assets that were attached belong to her.”

The evidence by Mrs Joubert however shows that none of the furniture concerned were inherited.

[18] As far as certain assets are concerned, in particular a computer which, according to Mrs Siebert, is her personal computer which she uses for her business, as well as the desk referred to in the inventory, she testified that she is the owner thereof which evidence can be accepted on probabilities. The same goes for the Treadmill, which according to Mrs Joubert, is used by her in her occupation as personal trainer. However there are no other evidence i.e documents substantiating such facts.

[19] According to second claimant items contained in the inventory, belong to Mr Joubert. These items are particularised as the bar fridge, the lawnmower and the edge trimmer. Although Mrs Joubert testified in Court that the bar fridge is built-in, such asset is indeed on the concession by Mrs Joubert regarded to be the property of Mr Joubert.

[20] In **S v Zuma and Others**¹, it was held that rebuttal of a presumption is “... on proof on a balance of probabilities”.

[21] In the present matter, the Court is confronted with the presumption that “... possession of a movable raises a presumption of ownership; and that therefore a claimant in an interpleader suit claiming ownership ... must rebut that presumption by clear and satisfactory evidence.”

[22] In **Ebrahim v Deputy Sheriff Durban and Another**², Henning J said as follows:

“The test whether a claimant has discharged the onus of proving his ownership to movable property which is not in his possession is whether in the result, the probabilities are balanced in his favour. The strength of the evidence which he has to produce to succeed depends on the circumstances of the particular case. In an interpleader suit, for example, the judgment creditor may be at a great disadvantage that he is not in the position to produce evidence to rebut that of the claimant who says that the disputed property is his ... the claimant to produce clear and satisfactory proof of his ownership.”

¹ 1995 (1) SACR 568 (CC)

² 1961 (4) SA 267 (D)

Evaluation of Second Claimant's evidence:

[23] Second Claimant is the only person who testified in regards to Second Claimant's claim.

[24] Mrs Joubert testified that after she and Mr Joubert got married, he stored his furniture and all belongings in the garage. The reason for that was because Mrs Joubert's furniture and belongings were in the communal home. At a later stage the furniture and belongings of Mr Joubert were moved to the house next to the Modder River ("**the river house**") which was rented. According to her, all the furniture and belongings of Mr Joubert were taken to this house. In Second Claimant's Particulars of Claim however it was stated that "*... we used most of his furniture to furnish the river house*". She testified that at some stage, after First Defendant has given the rented house to his sister, he purchased the second river house, already referred to in various affidavits. At that stage, according to Second Claimant, Mr Joubert's furniture and belongings were moved to the second river house.

[25] As far as the item regarding the 10-piece dining room set is concerned, in her Particulars of Claim Mrs Joubert stated that: *"I inherited the table from my grandfather and bought the wicker chairs from Builders Warehouse some 17 years ago"*. During her evidence however, she testified that she purchased the full set which would include the table. In this instance there is therefore a contradiction between the contents of the affidavit and her evidence.

[26] Mrs Joubert testified that she and her husband had been staying together in the same house for the past approximately 23 years. Until 2020 her husband had a very successful business from which he derived a good income, although she could not provide details in regards to his income. In spite of her husband being successful, her evidence was to the effect that the only domestic assets which she and her husband bought jointly or even individually, were things like linen and curtains, which they bought for the river house. The river house was registered in the name of Mr Joubert only. Save for such items referred to, according to Mrs Joubert, her husband did not buy any assets since they've been married. This is in particular in regards to household appliances and furniture for the communal place of residence.

[27] In regards to the Yamaha music system referred to in the inventory, she testified to the effect that this was bought from funds in the Capitec Bank account. This item was purchased allegedly by herself as late as 2020 when her existing music system at the time was struck by lightning. However, in spite of this being purchased only three years ago, she could not provide any documentary proof to show that it was indeed purchased by herself.

[28] During cross-examination she was confronted with the contents of her Particulars of Claim wherein it was stated that whereas her house was fully furnished, she and her husband did not have the need for most (not any) of Mr Joubert's property.

[29] As far as the allegations contained in the Second Claimant's Particulars of Claim is concerned to the effect that she was not involved in the disposal of Mr Joubert's furniture but knows that he sold it out of hand to various buyers, she was also confronted with the fact that no confirmatory affidavits have been forthcoming or produced by any of such buyers referred to.

Do the probabilities favour the Second Claimant?

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[30] As indicated, possession of a movable raises the presumption of ownership. In this particular instance therefore, whereas the assets were in possession of Mr Joubert at his place of residence at the time of attachment, it is therefore presumed in favour of the Mr Joubert, that such assets are indeed his property.

[31] However, the same presumption can also be raised in favour of Mrs Joubert, being the Second Claimant, whereas it is common cause that at the time of the attachment of such assets, it was also in possession of the Second Claimant in the communal home and place of residence.

[32] Based on the above, there are therefore two conflicting presumptions insofar as Mrs Joubert as a claimant in the interpleader proceedings, claims to be the owner of the property in regards to which the presumption of ownership also favours Mr Joubert. In those circumstances, the two presumptions are to be weighed against the other.³

[33] As correctly argued by Mr *Van der Merwe*, appearing on behalf of the First Claimant, the onus lies with the Second Claimant, to prove that she is indeed the owner of the movable assets.

³ Law of Evidence, Schmidt, p. 5-42.

[34] The Second Claimant must show on a balance of probabilities that she and not Mr Joubert, is the owner of the movable assets concerned.

[35] The most important factor on the version of the Second Claimant is that according to her, Mr and Mrs Joubert had been married to each other for approximately 22 years. During these 22 years, according to Second Claimant, her husband did not buy a single piece of domestic furniture or appliances for the family. She wishes to paint the picture to the effect that all movables held at the primary place of residence were her property whilst the movable assets of which Mr Joubert was the owner, were held at the river house. It is highly improbable that a husband and wife who have been married for more than 20 years would not jointly or individually both acquire such assets during the course of the marriage. Coupled with this is the fact that on the version by the Second Claimant herself, till 2020 when Mr Joubert was sequestered, it went very well with his business and his income. This is supported by the fact that it appears that at some stage Mr Joubert purchased a 5-bedroom “weekend house”. It is common cause that this house was subsequently, before the default judgment had been granted *inter alia* against Mr Joubert, sold for the substantial amount of R3.8 million. It is highly improbable that a successful businessman would not purchase any domestic movable assets for his family for a period of 20 odd years.

[36] It is taken into consideration that it appears that the Second Claimant also conducts a successful business as a personal trainer. Furthermore, it is taken into consideration that the Second Claimant has taken out a bond for the purpose of amongst others, refurbishments. However, on probabilities such bond was largely utilized to effect renovations to the immovable property and not to buy domestic movable assets. Interesting enough, Mrs Joubert did not provide the amount of such bond. However, it still remains highly improbable that for the duration of the marriage, it was only the Second Claimant who acquired domestic movable assets for the communal home and not Mr Joubert.

[37] The Second Claimant is further confronted with the fact that according to herself as well as the affidavit of Mr Joubert, when the river house was sold, it was sold with the content. This would mean by implication all the personal belongings and furniture of which Mr Joubert was the owner. This is contradicted by Mr Walker in a sworn affidavit wherein he expressly states that when he purchased the property “... *there was no furniture and/or any movable property of Mr Joubert sold with the property ...*” and that the property was empty when he moved in. This contradiction was not clarified by either Second Claimant nor, more importantly, Mr Joubert, in spite of Second Claimant being

in possession of Mr Walker's sworn affidavit at the date of Second Claimant's Particulars of Claim. Why was Mr Walker not called to testify in this regard?

[38] On the version of Second Claimant, she knew at the time that Mr Joubert sold these assets to different buyers. However, no additional evidence had been produced from such buyers in respect of the sale of Mr Joubert's movable assets. There are also no confirmatory affidavits from such buyers before Court.

The inference is uavoidably that the assets which were found at the time of the attachment are those of Mr Joubert taking into account of all the circumstances. The only inference to be drawn is that both Mr and Mrs Joubert were trying to mislead the Court._

[39] In respect of all the attached assets, not a single shred of documentary or other evidence had been produced to Court. The only evidence before Court is the single evidence by Second Claimant, which is contained in her affidavit and her evidence in Court. The only other evidence is in the form of Mr Joubert and Second Claimant's mother, Mrs Siebert. Due to the fact that the affidavit by Mr Joubert is contradicted by that of Mr Walker, the credibility of Mr Joubert is doubtful. As far as the affidavit by Mrs Siebert is concerned, she merely

confirmed but did not prove Second Claimant's alleged ownership through her affidavit.

[40] I must agree with Mr *Van der Merwe*'s submission that Second Claimant did not impress as a good witness. During her testimony, she was often evasive and vague. She could also not provide any reasonable explanation why no documentary proof in regards to any of the assets which were attached, had been placed before Court. This was even in regards to some assets such as the desktop computer, desk and treadmill which were according to Second Claimant utilized in her business as personal trainer. In this respect, no invoices and no tax returns had been placed before Court.

[41] As far as the assets allegedly belonging to the mother of the Second Claimant is concerned, no interpleader had been instituted by Mrs Siebert herself. The same goes for the assets allegedly belonging to the daughter

[42] As far as the Second Claimant alleges that certain ornaments were given to her as a gift this will be accepted in her favour in respect of items 44 and 46, whereas on probabilities there will not be documentary proof of such gifts.

[43] As discussed, it is for the Court to weigh the two contradictory presumptions of ownership through possession in respect of the two conflicting presumptions in favour of both Mr and Mrs Joubert. In doing so, the probabilities must be weighed in the light of all the evidence before Court.

[44] Whereas the Second Claimant has failed to provide clear and satisfactory proof in regards to ownership and also the probabilities do not favour the Second Claimant, her claim can therefore not be upheld.

[45] Whereas the Second Claimant was substantively unsuccessful in the interpleader, she is to pay the costs thereof.

Order:

Therefore, I make the following order:

1. First Claimant's claim is upheld, save for items 44 and 46.
2. Second Claimant's claim is dismissed, save for items 44 and 46.
3. Second Claimant is to pay the costs of the interpleader.

J J F HEFER, AJ

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Appearances on behalf of First Claimant: Adv HJ van der Merwe
Instructed by: EG Cooper Majiedt Incorporated
Bloemfontein

On behalf of the Second Claimant: Adv AP Berry
Instructed by: Rosendorff Reitz Barry
Bloemfontein