REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

_26-9- 2022__ _____
DATE SIGNATURE

CASE NUMBER: 2021/59399

In the matter between:

MARTHINUS JOHANNES WOLMARANS Applicant

and

TANIA DAVEY-SMITH Respondent

JUDGMENT

DOSIO J:

INTRODUCTION

[1] This is an application whereby the applicant seeks an order to declare an oral agreement entered into between the applicant and the respondent to be a binding agreement,

as well as specific performance.

[2] The applicant, is the owner of a male Hungarian Vizla dog known as ‘Cody’. The respondent is a breeder of Hungarian Vizla dogs and the owner of the Roxstar Hungarian Vizla Kennel. She also owns a female Hungarian Vizla dog known as ‘Charlie’.

[3] Cody, would be used to breed a litter of puppies with Charlie. A puppy called ‘Ocean’ was born as a result of the breeding.

[4] The applicant contends that in terms of the oral agreement it is entitled to delivery of Ocean, whereas the respondent contends that the applicant is not entitled to delivery of Ocean.

[5] The application is accordingly opposed and the respondent has raised a point *in limine*, submitting that there is a clear substantial dispute of fact which should have been anticipated by the applicant.

BACKGROUND

[6] Both parties agree that Cody would be used to mate with Charlie and that this was by way of an oral agreement. It is common cause that the communication between the parties was by way of WhatsApp messages. It appears there were also telephonic discussions.

[7] On 17 July 2021, Cody was transported to the respondent’s kennel by the applicant’s son. The applicant enquired from the respondent when he could collect the puppy and the respondent stated that it would be best if the puppy be collected at six weeks of age

[8] Only one puppy was born, namely Ocean, which is a male puppy.

APPLICANT’S VERSION

[9] The applicant contends that it would receive compensation for the use of Cody by the respondent in the form of one puppy born from the litter. However, despite the terms of the oral agreement and subsequent demands, the respondent has failed to deliver the puppy to the applicant.

[10] The applicant maintains that from the outset, the parties never discussed a situation that if only one puppy was born and it was male, that in such an event the puppy would remain with the respondent. Accordingly, the applicant contends that the respondent reneged from the

terms of the agreement. Accordingly, the applicant contends that the respondent has repudiated the agreement, which repudiation the applicant does not accept. The applicant requests that the oral agreement between the applicant and the respondent be declared a binding agreement and seeks specific performance in terms of the agreement by delivery of Ocean as agreed.

[11] The applicant contends that the case advanced by the respondent in the answering affidavit consists of bald or un-creditworthy denials and raises fictitious disputes of fact. Furthermore, it is palpably implausible, farfetched, and clearly untenable. The applicant maintains that it pursued the relief sought by way of application procedure, as opposed to the action procedure, as no dispute of fact was reasonably anticipated or evident.

[12] The applicant contends that neither the applicant, nor the respondent had foreseen that only one puppy would be born from the litter. Notwithstanding this fact, the applicant contends that it does not change the agreement, as the agreement needs to be interpreted on the understanding and intention of both parties as and when the agreement was reached.

[13] The applicant contends that the application of industry customs or business practices, as alluded to by the respondent, are unknown to the applicant and were not represented to the applicant, or made a condition of the agreement. Therefore, it is without merit, unfounded and untrue.

[14] The applicant contends that he has proven the agreement and performed his part. The applicant contends it has a clear right to enforce the oral agreement and that the respondent be compelled to comply with her obligations arising from the agreement.

[15] The applicant contends that the parties are bound to the oral agreement entered into and with reference to the interpretation of contracts, the Court having regard to all the evidence contained in the affidavits can decide this matter.

[16] The applicant contends that as a starting point, the wording of the oral contract and the portions in the WhatsApp messages clearly record that the applicant would deliver Cody for breeding and would receive a puppy from the litter.

RESPONDENT'S VERSION

[17] The respondent contends that when Cody first arrived at Roxstar Kennel, she posted

his arrival on her website and also created a WhatsApp group consisting of people who would be interested in puppies with Cody and Charlie's bloodline.

[18] The respondent contends that she sent the applicant a WhatsApp on 12 July 2021 and called him on 15 July 2021 to do a mating with Cody and Charlie. She states that this agreement was initiated by her and that she specifically told the applicant that she wanted a male puppy from the litter and that she would have first choice over the said litter.

[19] The respondent contends that upon the birth of Ocean, she informed the applicant that Ocean was male, and if certain tests conducted confirmed that Cody was the father, then Ocean would be staying with Roxstar Kennel as per the agreement.

[20] During the conversation of 15 July 2021, the respondent contends she also informed the applicant that she would only proceed with the mating arrangement on condition that the applicant transfer ownership of Cody to the respondent which would entail that the respondent be registered as Cody's owner with the Kennel Union of South Africa ('KUSA'). It appears that the purpose of this condition was not to take physical ownership of Cody, but to ensure that the Roxstar Kennel would acquire all rights with regard to Cody's progeny from the litter and that the pups born from the litter would be registered as Roxstar Kennel Hungarian Vizlas. According to the respondent, the applicant agreed and the respondent was duly registered as Cody's owner with KUSA.

[21] On 13 November 2021, the respondent received confirmation that Cody is Ocean's father and she communicated this to the applicant via WhatsApp. According to the respondent, she enquired from the applicant on 13 November 2021 whether he would want for Cody to try to have another litter with one of her other dogs, called Beetroot and the applicant agreed to this.

[22] The respondent contends that there is a clear dispute of fact in terms of the oral agreement. Although it was agreed that the applicant would receive a puppy from the litter as payment for the stud fee, it was agreed that the respondent, as breeder, would have first choice on any male puppy born from this litter, as the sole purpose of the mating was to ensure that the respondent had a healthy male purebred Vizla with this specific genetic combination which she could use as a stud going forward. This male puppy would replace her existing two males, as she was eager to use the genetics introduced by Charlie, into the breeding program, that is why she decided to approach the applicant specifically, with a view to do a mating with Cody and Charlie. Furthermore, after it came to the attention of the respondent that Charlie was

expecting only one puppy, the respondent communicated to the applicant that in the case it was male, it would remain with her and in the event that it was female, that the applicant could receive the female puppy as stud fee, alternatively, the respondent could sell the female and that the applicant agreed to accept a female puppy.

[23] The respondent contends that it was an implied term of the oral agreement that in the event that if only one puppy was born, which was male, the applicant would not be entitled to same, but would be compensated accordingly.

[24] The respondent contends that the applicant was aware of the dispute of fact prior to launching the application, as this position was made clear to him in numerous communications. In the light thereof, the action procedure should have been followed.

[25] As regards the WhatsApp messages that the applicant is relying on, the respondent contends that they have been taken out of context and the applicant has purposefully left out WhatsApp messages contradicting his version. The respondent contends that the applicant is trying to create the impression that she only informed him she would keep Ocean once Ocean was born, however, the respondent maintains that it was always part of the oral agreement that she would have first choice to the pup from the litter.

EVALUATION

[26] It is common cause that there was an oral agreement and that Cody was delivered to the respondent for breeding purposes. It is further undisputed that the only remuneration for delivery and use of Cody for breeding would be that the applicant would receive a puppy from the litter.

[27] The decision to proceed by way of motion instead of an action has been utilised more frequently due to it being less expensive and more favourable in obtaining an expeditious order. The party suing is *dominus litis* as he or she chooses the procedure to be used. The deciding factor which procedure to use is whether there is a dispute of fact. If there is a dispute of fact, the appropriate procedure is by way of action. [1]

[28] A court will be less inclined, when there are genuine disputes of fact on material issues, to decide the matter on motion on a mere balance of probabilities, as would be ordinarily done in an action.

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[1] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd* 1949 (3) SA 1155 (T) page 1161

[29] The so-called "Plascon-Evans test" was described by the Supreme Court of Appeal in in *National Director of Public Prosecutions v J G Zuma* [2] 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 had been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or un-creditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched, or so clearly untenable that the court is justified in rejecting them merely on the papers.' [3]

[30] A court should dismiss the application where there are fundamental disputes of fact on the papers and the applicant failed to make out a case for the relief claimed. [4] This notion was supported by the Supreme Court of Appeal in the matter *of Lombaard v Droprop CC and Others* [5] where it was stated that:

'…if a party has knowledge of a material and *bona fide* dispute, or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed.' [6]

[31] This Court is aware of the matter of *Sofiantini v Mould* [7] where it was stated that a Court must take a robust, common-sense approach to disputes in motion and not hesitate to decide the issue on affidavit merely because it may be difficult to do so. However, this is not a case where the Court can take such an approach. The applicant contends that the starting point remains the wording of the contract and the only written portion thereof is 'MJ1' and 'MJ2'. This cannot be, as there are additional WhatsApp messages between the parties, as well as telephone calls. The contents of the telephone conversations are not before this Court. The respondent also disputes that the message marked as annexure 'MJ2' was sent by the applicant on 15 July 2021, as she alleges it was sent on 27 April 2021. As regards the WhatsApp messages that relate to the applicant fetching the puppy when it was six weeks old, the respondent maintains these WhatsApp messages were sent prior to the birth of the puppy and prior to the awareness by both parties that only one puppy would be born. According to the

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[2] *National Director of Public Prosecutions v J G Zuma* 2009 (2) SA 277 (SCA)
[3] Ibid para [26]
[4] *Transnet Ltd t/a Metrorail v Rail Commuters Action Group* 2003 (6) SA 349 (A) at 368C-D and 368G-H
[5] *Lombaard v Droprop CC and Others* 2010 (5) SA 1 (SCA)
[6] Ibid page 11
[7] *Sofiantini v Mould* 1956 (4) SA (E) at 154G-H

respondent she took Charlie to the veterinarian for a check up on 7 October 2021 and the veterinarian informed her that Charlie was expecting only one puppy. According to the respondent, she informed the applicant on the same day that if it was a male puppy and that she would be keeping the puppy as per their agreement.

[32] There are further posts made on a WhatsApp group created by the respondent, to which the applicant was added. In this WhatsApp group, the respondent posted a message on 10 October 2021 at 16:25, which included a photo and a subtext to the effect that '*This pup will remain with Roxstar as a future stud dog'*. The respondent made a further post on the WhatsApp group on 13 November 2021 at 15:19 in which she confirmed that Ocean would be her primary stud dog for the next number of years. This message reads as follows: '*Ocean is one of the nicest doggies we have ever bred. He will be our primary stud dog for the next number of years, and we are excited to see his genetic contribution to the Vizla breed in our country*.' The respondent has attached proof that the applicant read both these WhatsApp messages. It is common cause that the applicant did not comment on this WhatsApp group. The applicant's version is that he did not want to go into an argument with the respondent on a group where other people were included, however, the fact remains that he read it and did not comment, until 13 November 2021 when he started confronting the respondent. These WhatsApp messages read as follows:

'2021/11/13 15:37 – Wollie Wolmerans Durbanville: *Ocean??*
2021/11/13 15:38 - Wollie Womerans Durbanville: *Kan ons praat oor hom*.
2021/11/13 15:38 – Tania : *Ocean bly by my*
2021/11/13 15:52 - Wollie Wolmerans Durbanville: Missed video call'

[33] The fact that certain information was being posted on WhatsApp must have alerted the applicant to the fact that Ocean would remain with the respondent. This Court is unclear what transpired between 10 October 2021 and 13 November 2021 and why there is no WhatsApp messages during this period. If the applicant did in fact comment, between the period 10 October 2021 and 13 November 2021, that is not before this Court.

[34] It is true that there is no expert statement indicating what the customary practices are, however, the applicant on his own accord admits in his founding affidavit that he did not have any previous experience in the breeding industry and therefore did not know how the industry operates. He repeated this once again in his founding affidavit stating that '*As indicated above, I do not know what is "customary" in the industry, as I am not a breeder*.' [8] The applicant

[8] Founding affidavit paragraph 8.22

contends that he obtained the information of the respondent during April 2021 and started communicating with the respondent in respect of the possibility that Cody could be used to sire pups with Charlie. The respondent on the other hand states that she and the applicant were known to each other since 2016. Should the version of the respondent be true, this would imply that the applicant was aware of the customs and practices.

[35] The applicant contends that the oral agreement was entered into between the parties in April 2021, whereas the respondent contends it was entered into in July 2021. This is unclear from the papers.

[36] The applicant's version is a complete denial as regards the fact that the respondent would have first choice to keep the puppy if only one puppy was born and it was a male, yet, he admits in his replying affidavit that the respondent did tell him that she wanted a male puppy from the litter. [9] The lack of any response from the applicant by WhatsApp during 10 October and 13 November, is further compounded by the fact that in the further WhatsApp conversations dated 13 November 2021, he agreed to using Cody to have another litter with a dog called 'Beetroot'. If this is the case, he must have understood that the respondent would be keeping Ocean. The Whatsapp conversation proceeded as follows:

'2021/11/13 15:25 – Tania: Beetroot is vandag op hitte. Ek sal graag n Cody werpsel wil doen met haar. Stel jy belang?

2021/11/13, 15:25 – Willie Wolmerans Durbanville: yes'

Once again, no mention is made that Ocean would not remain with the respondent.

[37] In the matter of *Bothma-Batho Transport (Pty) Ltd v S. Bothma & Seuns (Edms) Bpk* [10] the Supreme Court of Appeal stated that:

'Whilst the starting point remains the words of the document which are the only relevant medium through which the parties have expressed the contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being.' [11]

[38] It is clear that the oral agreement did not cater for all the unforeseen consequences of the birth of only one puppy. The sole purpose of mating for the applicant was to obtain a puppy, yet the sole purpose of mating for the respondent was to ensure that the respondent had a

[9] Replying affidavit paragraph 14.5
[10] *Bothma-Batho Transport (Pty) Ltd v S. Bothma & Seuns (Edms) Bpk* 2014 (2) SA 494 SCA
[11] Ibid paragraph 2

healthy male purebred Vizla, with the specific genetic combination which she could use as a stud going forward.

[39] Due to the birth of only one puppy, which was male, the version of the respondent does not appear to raise a fictitious dispute of fact, which is palpably implausible, farfetched, or so clearly untenable that the court is justified in rejecting it merely on the papers. The applicant's version of what was agreed between him and the respondent, is directly at odds with the version of the respondent.

[40] Considering the unforeseen consequences, as well as the factual disputes, this court cannot on the papers alone determine the true intention of the parties when this oral agreement was reached.

[41] Even if specific performance is justified in the matter *in casu*, this court still has to consider whether the motion procedure in obtaining such relief would be appropriate. In my view, there is a dispute of fact and the motion procedure is not the appropriate forum. Accordingly, the point *in limine* is upheld with costs.

ORDER

[42] In the result, I make the following order;

1. The application is dismissed with costs.

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JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 26 September 2022

Date of hearing:	6 June 2022
Date of Judgment:	26 September 2022

Appearances:

On behalf of the applicant:	Adv. JHF Le Roux
Instructed by:	DBM Attorneys
On behalf of the respondent:	Adv. R. Van Der Merwe
Instructed by:	De Villiers & Stenvert Attorneys