

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

Case No. 2023-052464

In the matter between:

LINDSI RUTH WOOD

Applicant

and

MICHELLE JAYNE MILLER

First Respondent

PAWS IN MOTION CC

Second Respondent

JUDGMENT

D'OLIVEIRA AJ:

1. This matter commenced its life as an urgent application on 30 May 2023.
2. The applicant, a businesswoman and recreational horse rider, approached the court as a matter of urgency to secure the return of a male gelding show-jumping horse with the name Evening Storm, together with a range of horse care and riding

equipment ("the equipment").

3. Evening Storm and the equipment are in the possession of the first respondent, a veterinarian who resides in Walkerville together with her partner, Marius Vorster ("Mr Vorster"). I will refer to the first respondent as "the respondent".

4. The respondent and Mr Vorster are also recreational horse riders. They stable and care for Evening Storm and a number of other horses.

5. The second respondent is a close corporation owned by the respondent, through which she practises as a veterinarian. The second respondent was cited only in the event that it, as opposed to the respondent, was in possession of Evening Storm and the equipment. It is clear from the affidavits filed by the respondent that they aren't.

6. In the founding affidavit, the applicant claimed that she had placed Evening Storm and his equipment temporarily into the care of the respondent on 9 October 2022. She said she did so because on 6 October 2022, she suffered a serious riding injury to her ankle that meant she would undergo an operation on 12 October 2022, and thereafter be unable to ride for six months. She explained that Evening Storm required regular riding in order to keep him in good condition and to prevent him from going lame. Her injury prevented her from riding Evening Storm and properly caring for him herself.

7. The applicant explained that she had placed Evening Storm into the care of the respondent in the following circumstances: She said she had learnt about the respondent and Mr Vorster, the fact that the respondent was a vet who looked after horses, and the fact that they had a particular interest in Evening Storm in August 2022. Mr Vorster had called her on 12 August 2022 and had, together with the respondent, visited Evening Storm and the applicant at Cellehof stables several days later. She was told that the respondent had also had a riding accident, and that Evening Storm was the right horse to aid the respondent in her own rehabilitation.

She said that the respondent and Mr Vorster had “joked” that they would be willing to “babysit” Evening Storm if he ever needed looking after.

8. The applicant launched the urgent application when she discovered, so she alleged, that the horse's condition had deteriorated and he was not being properly cared for. She said that the respondent and Mr Vorster had undertaken to return Evening Storm to her on 29 March 2023, but that the respondent had refused to allow her to retrieve the horse on 1 April 2023.

9. The respondent filed an answering affidavit in the urgent application, which she apparently prepared with limited or no legal assistance.

10. In that answering affidavit, apart from disputing that the horse's condition had deteriorated and the matter was urgent, the respondent claimed that she was the owner of Evening Storm. She said that the applicant had given Evening Storm and the equipment to her after the applicant had fallen off the horse and injured herself, and no longer wanted the horse. She attached an affidavit by a Ms Mariet Hammes in support of her version. Ms Hammes was present when the respondent and Mr Vorster collected Evening Storm and the equipment on 9 October 2022. She also quoted and attached a number of WhatsApp messages exchanged with the applicant that apparently supported her version.

11. Because the application is centred on Evening Storm, and the fate of the equipment appears bound to the fate of Evening Storm, I will hereafter, except where necessary, not refer to the equipment.

12. The urgent application did not proceed on the day of the set down. It was removed from the roll. Counsel appearing for the applicant said the matter was not ripe to be heard because a replying affidavit had not been filed, but that, in any event, there was a dispute of fact on the papers.

13. An exchange of letters followed after the removal of the urgent application

from the roll in July and August 2023. The applicant proposed that the parties agree to refer the matter to oral evidence. The respondent refused.

14. Between August 2023 and January 2024, the respondent discovered a range of documents in response to a Rule 35(12) notice, the applicant replaced counsel who had represented her in the urgent application, and the respondent replaced her attorneys.

15. On 15 January 2024, the applicant filed a comprehensive replying affidavit of some 200 paragraphs in which she dealt in detail with the correspondence between the parties and addressed the respondent's claim that Evening Storm had been donated to her. The applicant also set out in detail the circumstances in which the respondent and Mr Vorster had communicated their decision to return Evening Storm to the applicant on 29 March 2023. She claimed that irrespective any dispute about whether ownership of Evening Storm and the equipment had passed to the respondent on 9 October 2022, the respondent and Mr Vorster had unconditionally undertaken to return them to her on 29 March 2023. She also placed the WhatsApp messages relied on by the respondent in the answering affidavit in their proper context. She showed how the respondent had omitted messages or parts of messages, and claimed that this was misleading.

16. The replying affidavit was well-prepared and convincing. Had no further affidavits been filed, the court may have been inclined to decide the matter in favour of the applicant on the papers, adopting the robust approach set out in *Soffianti v Mould* 1956 (4) SA 150 (E).

17. But the affidavits did not end there.

18. On 19 February 2024, the respondent filed a comprehensive supplementary affidavit.

19. In the supplementary affidavit, the respondent, in her turn, comprehensively

addressed the record of correspondence between the parties, and addressed the facts relied upon by the applicant that militated against the acceptance of the respondent's version. The respondent attached the confirmatory affidavits of four persons in support of her version. The respondent pertinently set out her and Mr Vorster's version of how the applicant had given Evening Storm to her. She discussed a series of WhatsApp messages that were exchanged with the applicant in which, so the respondent alleged, the applicant had unequivocally represented that she had given Evening Storm to her. And she disputed that she had undertaken to return Evening Storm to the applicant.

20. The net effect of the supplementary affidavit was that it made the dispute between the parties about the ownership of Evening Storm and the equipment irresolvable on the papers.

21. On 9 April 2024, the applicant filed an affidavit in response to the supplementary affidavit. The affidavit was helpful in clarifying what transpired at the hearing of the urgent application. It did not, in my view, reverse the net effect of the supplementary affidavit of the respondent: the dispute remained irresolvable on the papers.

22. Despite that there was no formal application for the filing of either the fourth or the fifth affidavits, I have decided to admit them. I formally admitted the supplementary affidavit at the hearing of the application on 29 January 2025. The supplementary answering affidavit is also admitted.

23. I decided to do so because I am of the view that it is of crucial importance in this case, that each party is allowed to place their full version before the court and deal fully with the version of the opposing party (*Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W), 604C-D). My admission of the supplementary affidavit was also aimed at eliminating any prejudice, real or perceived, that may have arisen from the respondent not being able to deal with the content of the replying affidavit. The admission of the applicant's fifth affidavit was

necessary to ensure the applicant likewise had a fair opportunity to respond to the new material in the respondent's supplementary affidavit.

24. At the hearing before me on the opposed motion roll, the applicant persisted in seeking final relief, principally on the basis that the respondent had decided to return Evening Storm to her, and had said she and Mr Vorster would do so on 1 April 2023. The applicant applied in the alternative that the matter to be referred to oral evidence. Both the application for final relief and the referral to oral argument were opposed by the respondent.

25. I have already indicated that I am of the view that there are material disputes between the parties that cannot be resolved on the papers. Accordingly, Rule 6(5)(g) applies. It provides:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

26. The respondent urged me to dismiss the application because the applicant had abused the process of the court by proceeding on application. The respondent submitted further that the applicant's application for the matter to be referred to oral evidence should be refused because it had been brought in the alternative, and in unexceptional circumstances. The respondent submitted also that the matter should not be referred to oral evidence because, on the evidence before the court, the probabilities weighed heavily against the applicant: referral to oral evidence would not change the outcome.

27. I propose to begin by considering the latter.

28. In my view, the probabilities do not weigh heavily in favour of the respondent on the question whether ownership passed to her on 9 October 2022. They are, at best for the respondent, evenly balanced.

29. It is inherently improbable that the applicant would donate a horse and equipment to the value of some R180,000.00 to a person she hardly knew, and continue to pay the medical insurance. The respondent is also not assisted by the absence of a detailed statement from Mr Vorster about the content of his discussions with the applicant regarding the basis on which Evening Storm was handed over on 9 October 2022. In some cases, it is not enough for a crucial witness to merely confirm what another person reports. This is such a case.

30. On the other hand, the respondent's version is not untenable or farfetched. It is supported by the sworn statement of Ms Hammes, who says she heard the applicant say to Evening Storm that he was going to a new "*forever home*", and the confirmatory affidavit of Mr Vorster. The WhatsApp messages, on the respondent's interpretation, are also consistent with her version.

31. In my view, the probabilities on the defence of estoppel are evenly balanced. The continuum of communications between October 2022 and March 2023, relied on by the respondent, contains a number of statements which, depending on the context, may well constitute representations that Evening Storm was donated to the respondent. They may, however, also be no more than the sentimental language of an ardent horse lover who has placed her horse into the care of another in a new stable for a period. Spoken in the context of an agreement that the temporary care of a much-loved horse being entrusted to the respondent and Mr Vorster – which is the applicant's version – the same statements would not tend to mislead the respondent into believing that the horse had been donated to her. The strength or weakness of the estoppel defence is, *prima facie*, tied to the first issue.

32. In my view, the prospects of this third issue are also finely balanced. The respondent's message on 29 March 2023 is certainly and unequivocal statement that she and Mr Vorster had decided to return Evening Storm to the applicant. But the key question is whether and when ownership transferred (assuming it is held that the respondent was the owner of Evening Storm prior to making that statement). The answer to this question will turn on the meaning of the WhatsApp message in which the above statement was made, and the WhatsApp messages and voice notes that followed, and what they reveal about the respondent and Mr Vorster's conduct and intentions. Oral evidence will certainly assist the court in this regard.

33. In conclusion, the probabilities on the affidavits are not a reason to refuse a referral to oral evidence. On the contrary, the evenly balanced probabilities are in favour of a referral (see *Kalil v Decotex* 1988 (1) SA 943 (A) at 981D-982A).

34. I turn to deal with whether a referral to oral evidence should nonetheless be refused for the reasons submitted by the respondent.

35. I find I am disinclined to dismiss the application because of the existence of material disputes of fact. I do not agree that the original launching of the matter by way of application, or the applicant's decision to persist with the application after the urgent hearing, constitutes an abuse of process.

36. While it is true that counsel who represented the applicant at the urgent hearing expressed a view that the answering affidavit had raised a dispute of fact, and it is also true that the applicant proposed a referral to oral evidence, the applicant's replying affidavit in itself demonstrates the reasonableness of the decision to continue with the application. As I have indicated, had the papers remained as they were then, the applicant may have succeeded.

37. The applicant's decision to persist with the application after receiving the respondent's supplementary affidavit was also not unreasonable. The fourth and fifth affidavits had not yet been admitted. The view taken by the applicant's legal

representatives that they may possibly succeed in obtaining final relief on the basis of the statement by the respondent that she and Mr Vorster had decided to give Evening Storm back to the applicant, was not unreasonable. And the applicant's attempt to bring the matter to finality without further delay, was understandable in the circumstances I refer to below.

38. That brings me to the submission that I should dismiss the application and refuse a referral to oral evidence because the circumstances of the present matter are not exceptional. The respondent based this submission on the following *dictum* in *Law Society of the Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) at paragraph 23:

“An application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail (De Reszke v Maras and Others 2006 (1) SA 401 (C) ([2005] 4 All SA 440) at paras 32 - 33).”

39. The decision of *Mogami* was one in which the appellant had sought a referral to oral evidence on appeal, in a matter about professional misconduct. The decision of *De Reszke*, referred to in *Mogami*, was an application in which reference was sought to oral evidence, in a matter about a disputed will, in circumstances where this was clearly not justified.

40. Those cases were wholly unlike the present case.

41. The present case is about a show-jumping horse to whom the applicant, the respondent, and Mr Vorster, have a deep emotional attachment. The strength and depth of this attachment is evident from the lengths to which the parties have gone in the litigation so far. It is also evident on the affidavits. The following examples provide illustration: The applicant states that when she had to part with Evening Storm on 9 October 2022, albeit temporarily, she was unable to stop herself crying

for half an hour. The applicant conveyed to Mr Vorster in a WhatsApp message that she was afraid to visit Evening Storm whilst he was in their possession because she would find it too difficult to leave him again. The respondent states in her answering affidavit, *inter alia* that “*he is our horse*” ... “*we will never sell him*” ... “*our family will do anything for him*” ... “*we will go beyond and above to do anything for him*”. Mr Vorster’s WhatsApp message to the applicant on 29 March 2023 reads: “*Lindsi I don’t know what to say to you but honestly my heart is in pieces, I can’t come to terms that I have to part ways with Storm I honestly don’t know how to process it.*” It is fair to say that (at least from the perspective of the applicant, the respondent and Mr Vorster) their connection with Evening Storm is comparable to the bond between a parent and a child.

42. In my view, this renders the matter exceptional. It is inconceivable that a court would decide a dispute over the custody of a child by default. For similar reasons, and given how much Evening Storm means to the respective parties, I am of the view that it would be wholly inappropriate for the court to decide the matter on the basis of the failure by one party to follow the correct procedure from the outset, or on the respondent’s version in accordance with the rule in *Plascon-Evans*.

43. In addition, Evening Storm is a show-jumping horse which means the matter is time-sensitive. He will not live forever. The matter cannot be left to meander its way through the court system while his prime riding years diminish. It would be inappropriate to dismiss the application and compel the applicant to start the proceedings afresh. If the court in due course were to find that the applicant is the owner or Evening Storm must be returned to her, she will have lost another two years, or more, of these. Perhaps more distressingly for the applicant, she will have been separated from Evening Storm for another two years. The respondent and Mr Vorster, on the other hand, will not suffer this disadvantage because Evening Storm is in their possession. But they would have to bear the uncertainty hanging over them of possibly losing Evening Storm to the applicant. It is also only fair to them that they have certainty, one way or another, as soon as possible.

44. In the circumstances, I have decided to refer the matter to oral evidence. I have also exercised my discretion in terms of Rule 6(5)(g) to set limited time periods for the preparation for oral evidence and have directed that the parties should approach the Deputy Judge President immediately for the allocation of a preferential date. I have done so with a view to the matter being finalised as soon as possible this year.

45. The following order is made:

45.1 The following issues are referred to oral evidence:

45.1.1 Whether ownership of the horse Evening Storm and/or the equipment referred to in paragraph 2.2 of the Notice of Motion (“the Equipment”) transferred from the applicant to the first respondent during the period 6 October 2022 to 9 October 2022.

45.1.2 Whether the applicant should be estopped from asserting ownership of the Evening Storm and/or the Equipment by virtue of the representations made by her in and during the period October 2022 to March 2023.

45.1.3 Whether ownership of Evening Storm and/or the Equipment transferred from the first respondent to the applicant, or the applicant is entitled to the return of Evening Storm and/or the Equipment, by virtue of what occurred on 29 March 2023 and subsequent thereto.

45.2 The parties are directed to deliver pleadings on the above issues as follows:

45.2.1 The applicant must deliver its pleading on the referred issues within 10 days of the date of this order;

45.2.2 The respondents must deliver its pleading in answer within 10 days of the delivery of the applicant’s pleading;

45.2.3 The applicant may replicate within 5 days of the delivery of the respondents’ pleading;

45.2.4 The respondents may deliver a rejoinder within 5 days of the delivery of the replication.

45.3 The parties shall make discovery by no later than Friday 13 June 2025.

45.4 The applicant shall upload a consolidated trial bundle of the discovered documents, arranged in strict ascending chronological order by no later than Friday 20 June 2025.

45.5 The parties are directed to approach the Deputy Judge President for the allocation of a preferential trial date.

A J D'OLIVEIRA

Acting Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 22 April 2025.

HEARD ON: 29 & 31 January 2025

DECIDED ON: 22 April 2025

For the Applicants: Esbie Venter

Instructed by Laher Attorneys, Johannesburg

For the Respondent Michael Dafel

Instructed by Webber Wentzel, Johannesburg