IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION-MAKHANDA

~~**REPORTABLE**~~**/NOT REPORATBLE**

Case No: 3261/2021

In the matter between:

DEPARTMENT OF HUMAN SETTLEMENTS, EASTERN CAPE PROVINCE First Applicant

THE HEAD OF DEPARTMENT & ACCOUNTING OFFICER OF THE DEPARTMENT OF HUMAN SETTLEMENTS, EASTERN CAPE Second Applicant

and

OLGA GAEHUMELWE DUITLWILENG Respondent

JUDGMENT

MALUSI J:

[1] This was an extended return date of a *rule nisi* which had been obtained ex parte and in camera by the applicants. The *rule nisi* was confirmed despite the application being opposed on the return date. It was indicated that reasons would be provided later and these now follow.

[2] The applicants sought an order for the respondent to return a laptop that was allegedly in her possession. In her opposition the respondent asserted that the laptop was lost before it was demanded by the applicants.

[3] The respondent was employed by the first applicant as the Chief Financial Officer. She had been notified of an intention to place her on precautionary suspension due to very serious allegations of misconduct. She was instructed in the notice to return the official laptop among other things, to the second respondent. She answered the notice by simply disputing the instruction on the basis that she had not yet been suspended. The decision to suspend her was taken a day after her answer. Crucially, the instruction for her to forthwith

return the laptop was repeated in the suspension letter. She failed to do so.

[4] Six *(6)* days later the respondent informed the applicants by email that the laptop had been stolen three *(3)* days after the suspension letter was dispatched to her.

[5] The applicants' attorneys commissioned a digital forensic investigation as part of the disciplinary proceedings against the respondent. The forensic expert was instructed to locate the laptop in the course of the investigation. He filed an affidavit at the conclusion of his investigation.

[6] The forensic expert asserted in his affidavit that the laptop was utilized three *(3)* months after it had been reported stolen within a 150 metres radius that included the respondent's residence. When so utilized it was connected to a wifi network whose identifying name was *'diutwileng home wi-fi'*. The expert expressed the opinion that the laptop had probably been located at the respondent's residence when so utilized. He drew the conclusion that the respondent had retained the laptop and continued using it after the alleged theft.

[7] In her answering affidavit the respondent averred that the laptop was stolen from her home three *(3)* days after she had been suspended. She gave details of the alleged theft which occurred in her absence. She stated that at the time the application was launched she was no longer in possession of the laptop.

[8] The applicants based their application on the *actio rei vindicatio* whose principles are settled in our law. The applicants were required to prove ownership of the laptop.[1] The second requirement is that the respondent was in possession of the laptop at the time of the initiation of the application.[2]

[9] It was common cause that the first applicant was the owner of the laptop.

[10] The issue for decision was whether the respondent was in possession of the laptop at the time it was demanded. It was asserted that due to the alleged theft having been reported to the applicants there was a dispute of fact. It was inappropriate for the

[1] *Gouolini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 82A-C.
[2] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20C-D.

applicants to have proceeded by way of application in such circumstances, so it was argued.

[11] In the exercise of its discretion a court must in each case examine the alleged dispute of fact and see whether in truth there is a real, genuine and bona fide dispute of fact which is not merely illusory. There is a real risk that if this is not done a respondent may be able to raise a fictitious dispute of fact and thus delay the hearing of the application.[3]

[12] The applicable principles are settled in our law in determining whether the respondent's evidence raises a genuine dispute of fact, or the respondent's version is clearly farfetched or untenable, consists of bald or uncreditworthy denials, is fictitious, is palpably implausible, that the court is justified in rejecting them merely on the papers.[4] *(the list is not exhaustive).*

Some of the applicable principles are the following:

12.1 The test is a stringent one that is not easily satisfied.[5]

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[3] *National Director of Public Prosecutins v Zuma* 2009 (2) SA 277 (SCA) at 290F.
[4] *Zuma ibid* at para 26.
[5] *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts (Pty) Ltd* 2012 (5) SA 300 (SCA) at 307F; *Mathewson & Another v Van Niekerk & Others* [2012] ZASCA 12 para 7.

12.2 Vague and insubstantial allegations are insufficient to raise the kind of dispute of fact that should be referred to oral evidence.[6]

12.3 In circumstances where the evidence for the respondent is blatantly implausible such that it may be rejected on the papers, the court should not shirk from rejecting it on that basis. The court must take a *'robust, common sense approach'* and not hesitate to decide an issue on affidavit merely because it may be difficult to do so.[7]

12.4 A real, genuine and *bona fide* dispute of fact can only exist where the court is satisfied that the party who purpots to raise it has in his/her affidavit seriously and unambiguously addressed the fact said to be disputed[8] otherwise a court will accept the applicants' version.

[13] The court must consider all the pertinent facts in determining the issue. The respondent has not provided any reason whatsoever why she failed to return the laptop when lawfully instructed to do so in her suspension letter. The lack of explanation lends credence to the

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[6] *KWT Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E) at 156I-J.
[7] *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H.
[8] *Wightman t/a J W Construction v Headfour (Pty) Ltd* 2008 (3) 371 (SCA) at para 13.

contention by the applicants' counsel that the respondent decided to retain the laptop in an effort to frustrate the investigation against her.

[14] The applicant has presented compelling and persuasive evidence from a forensic expert that the laptop was used in the vicinity of the respondent's private home and accessing her home wi-fi well after the purported theft. The ineluctable conclusion, in the absence of an explanation by the respondent, was that she was using the laptop at her private residence three *(3)* months after the purported theft. She has not explained how the fictitious thief would be able to assess her home wi-fi when using the laptop in the vicinity of her home. The respondent's version was rendered more implausible by the applicants' uncontested evidence that passwords are used to gain access to its electronic devices/equipment. It beggars belief that the fictitious thief would have known the applicants' password to be able to use the laptop.

[15] It was my strong view that the respondent had not dealt at all with the evidence which disproved her allegation of a permanent loss of the laptop. The court was bound to accept the applicants' evidence that the respondent was in possession of the laptop after

the date of the alleged theft. Since there had not been any further alleged theft, it stands to reason that she was in possession of the laptop when the application was launched.

[16] It is for the above reasons that the *rule nisi* was confirmed.

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T MALUSI

JUDGE OF THE HIGH COURT

***Appearances*:**

For the Applicants: Advocate Rorke SC *instructed by*
Wesley Pretorius & Associates Inc
c/o Netteltons
118A High Street
MAKHANDA

For the Respondent: Advocate Nzuzo *instructed by*
Badi Loliwe Attorneys
c/o Mabentsela & Associates
Office No 2, 110 High Street
MAKHANDA