

REPUBLIC OF SOUTH AFRICA



**IN THE COURT OF THE COMMISSIONER OF PATENTS
(FOR THE REPUBLIC OF SOUTH AFRICA , PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES NO

(3) REVISED:

31/01/2023

DATE

SIGNATURE

A handwritten signature in black ink, appearing to be "R. D. van der Merwe", is written over the signature line.

In the matter between

Case No:

Patent No: 2019/05483

In the matter between:

JOHN EDWARD KEEN

First applicant

MPC CHEMICALS (SA) (PTY) LTD

Second applicant

and

OHMS INNOVATIONS (PTY) LTD

First respondent

SCHALK STEPHANUS PRINSLOO

Second respondent

JUDGEMENT

BOKAKO AJ

This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Case lines.

INTRODUCTION:

1. This is an application for relief in terms of section 28 of the Patents Act, 57 of 1978 ("**the Act**"). This application has been opposed by the respondents and the parties have exchanged the required affidavits.
2. This section confers jurisdiction on this court to determine disputes between persons as to their right to or title in a patent.¹ It also empowers the court to order that a person execute a deed of assignment in respect of the patent if the court declares that a person has a right to the exclusion of any other person to apply for a patent. The applicants assert, and the respondents do not contest, that this dispute fall within the provisions of section 28(1).

ISSUES OF DISPUTE

¹The section also empowers this court to determine disputes between persons as to their right to obtain a patent for or to make, use, exercise or dispose of an invention. In this case, however, the patent has already been obtained; and the dispute is therefore concerned with the rights to that patent.

3. The applicants dispute, in respect of the patent in issue, being South African Patent number 2019/05483 entitled 'METHOD OF UNDERGROUND MINING' (**"the patent"**):
 - 3.1. the respondents' rights to obtain the patent;
 - 3.2. the respondents' rights to make, use, exercise or dispose of the invention in the patent; or
 - 3.3. the respondents' rights to or title in the patent.
4. The applicants seek various heads of relief in respect of the patent under section 28, on the basis that the persons cited in the patent and who brought the application for the patent, did not and do not have a right to do so.
5. The application is mainly concerned with (under s28 of the Act) who is entitled to the patent.
6. The Applicants seek a declarator that the first respondent holds no entitlement or right "to obtain"² South African patent number 2019/05483 entitled "Method of Underground Mining";
7. Applicant seeks an order that the first respondent be ordered to assign the patent to the applicant.
8. They seek to order the Registrar of Patents to carry out certain directions in circumstances where the Registrar has not been joined.
9. As is appropriate under circumstances of relief pursuant to s28 of the Act, the applicants seek relief entitling them to claim damages for past infringement of the patent.

² The patent has already been obtained, however.

BACKGROUND

10. The Applicant's contends that by virtue of the nature of this opposed application, the Commissioner is required to adjudicate the application having the benefit of the applicants' facts, evidence and submissions in support thereof. In that the Plascon-Evans rule provides that where disputes of fact arise on the affidavits in motion proceedings, "*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 latter, justify such an order of* or an independent contractor consulting to the fourth respondent. As contended by the Applicant, it was stated that the patent abstract was found to have been published in the Patent Journal, that was issued on 23 December 2020.
11. On the 21st of August 2018, the first respondent lodged a South African Provisional Patent application number 2018/05555 for the registration of a patent with the South African Patent Office. On the 20th of August 2019, South African Complete Patent application number 2019/05483, claiming priority from 2018/05555 was filed by the first respondent with the South African Patent Office; on the 17th March 2020, the registrar of patents accepted the complete specification of 2019/05483 as it complied with formalities as required by the Patents Act and Regulations; the inventors" are named to be Jacobus Johannes Geyser and Schalk Stephanus Prinsloo (the second and third respondents). On the 23rd of December 2020 the registrar granted the patent to the first Respondent. The field of the invention covered by the patent in issue is a 'Method of Underground Mining'.

12. The Applicant further contends that the invention relates to a method of total extraction of ore pillars in underground mining operations. In years gone by, it was common in the mining industry to not mine out so called 'ore pillars' or "reef pillars" but to leave these pillars in situ. Further contending that in his experience in the industry, the available methods to stabilise underground excavations did not adequately address the necessity to stabilise excavations in underground mining operations.
13. The Applicant set out to develop a satisfactory method, he recognised that these pillars contain the same minerals as the surrounding stopes that have been mined and the pillars could be mined to extract those minerals and increase yield and production. He also recognised the need for effective and efficient mining methods by which these pillars, could safely be replaced with so-called "support pillars", or "pseudo pillars". Thus, he determined and developed a novel and unique means to overcome a foregoing difficulty, through his technique of utilising pseudo-pillars that do not comprise ore. The Applicant further submitted that he devised the invention as described in the specification of the patent prior to its priority date and that the first respondent, claiming to be the patentee of the patent, was never involved in this process; and neither of second or third respondents.
14. The Applicant contends that he is an independent consultant, contracted as such to render services from time to time in favour of the second applicant and in respect of its underground mining operations. He has been in this position since August 2018. For several years, prior to his current appointment with the second applicant, he was contracted to

perform services at, inter alia, Cooke Operations, Randfontein Estates, Sibanye Gold through Open House. The Applicant have more than 50 years' experience in underground mining operations and rock engineering. He holds an Onsetter or Banksman's certificate, awarded to me in 1972, an elementary certificate for surveyors, awarded to him in 1976 by the Union Corporation Limited, a Mine Overseers Certificate of Competency, also was awarded in 1980 a certificate for completion of a Rock Mechanics for Practitioners course, during 1986; a certificate in Rock Mechanics was awarded to him in 1986, certificates for the successful completion of Computer Training Basic Excel and Basic Windows and at Kinross Mines Limited.

15. He was contracted by Open House in terms of a letter of appointment, drawn up by the Open House management. He signed and concluded on the 12th of August 2012. His appointment was with effect from 13 August 2012. Contending that he was never treated as an employee at Open House. The pillar replacement technology that the Applicant developed was technology that he had begun to develop and had been known to him since the late 1990's. The Applicant brought his knowledge and experience in respect of pillar replacement technology to the contract of appointment with Open House. Open House did not have any such advanced experience and knowledge; the Applicant was consulted to become appointed as Rock Engineer on behalf of Open House. An interview took place in the first half of 2012, at a restaurant near Carnival City. During this interview, the Applicant contends that he disclosed to Steinmann information that was of a confidential nature.

16. The Applicant further contends that he devised and developed the pseudo-support pillar technology. In doing so, he brought his extensive expertise. He has been employed in various positions as Geologist, Chief Geologist and Mineral Resources Manager for the past 25 years in East Rand mining operations.
17. His concept was not pursued because, at the time, it was not financially viable as a result of the poor gold price. He had developed this technology and was known to him only.
18. It is this technology which the respondents, jointly and severally, are now seeking unlawfully to appropriate for themselves and misrepresent as their invention and intellectual property.
19. The contents of his draft paper remain confidential and was done by him in his personal capacity, contending that the Respondent`s plagiarised an unauthorised reproduction and presentation of his work. Submitted that not only is the Respondent`s application fraudulent, unlawful, non-compliant with the provisions of the Patent Act, but it is also a material misrepresentation of the true state of affairs relating to the introduction and use of pseudo pillars support technology and underground mining.
20. He is a true and only inventor of the method of underground mining to which the first respondent now seeks, fraudulently and falsely, to lay claim. He never authorised any assignment of the invention to the first respondent and the first respondent was not a person entitled in terms of the relevant provisions of the South African Patents act to apply for the patent.

21. The respondents each acted and contributed to the unlawful, misrepresenting and misleading application under number 2019/05483 that had been made for a South African patent.
22. In the premises, there exists a clear dispute between the applicants, on the one hand, and the respondents on the other hand, in respect of the right of the latter to have obtained the patent for my invention, as well as to the respondents' rights to or title in the patent in issue.
23. The Respondent contends that the first applicant did not make the invention which is the subject of the patent; and even if he did make a contribution, he did so during the course and scope of his contract with the fourth respondent, which disentitles him to claim any right to the patent.
24. It was also submitted by the Respondent that the first Applicant concluded a contract of employment with the fourth respondent in on the 12th of August 2012. Although the first applicant claims to have been an independent contractor, the contract is clearly one of employment.
25. Further directing the court to specific contractual clauses which refers to inventions made "*during your employment*"; and that the clause would be meaningless if in fact the first applicant was not an employee of the fourth respondent. The Applicant worked for the fourth respondent and received remuneration for doing so. Therefore any inventions made by the first applicant in the course and scope of his employment vest in the fourth respondent. It follows that the rights in any invention made by the first applicant at Cooke Shafts vests in the fourth respondent.

26. Further the contract expressly records that the first Applicant will be bound by the fourth Respondent's policies and procedures, including the disciplinary code, drug abuse and sexual harassment policies, health safety and environmental policy and the quality policy. This makes it plain that the first applicant was working subject to the control and supervision of the fourth respondent at all times and that he had to comply with the fourth respondent's rules in the workplace. Had the first applicant been an independent contractor he would not have been subject to the control and direction of the fourth respondent.
27. Further contending that this invention, the development of a workable concrete support pillar that can replace an ore pillar was the result of the respondents' extensive research and development. The detail of that research and development is set out, in detail, in annexure A7 to the answering affidavit. Such annexures set out the tests carried out on samples of differing dimensions, and the measures of strength of each. According to the respondent, the first applicant was using timber as support material for his "pillars" when they first met him, he only started using (concrete filled) geotextile grout bags after consulting with him. Therefore It doesn't appear from the evidence that the first applicant had built a "pseudo-column", or a concrete pillar of any description before 2012.
28. Respondent contends that the description of the Applicant's idea as a "theory"; and the reference to what he was "developing" puts beyond doubt that the first applicant had not actually developed an invention in 2012. The first applicant plainly had nothing more than a theory about how a pillar might work. It wasn't an inventive theory either: the idea that one can stuff

a bag with sufficient material to create a support structure, is hardly ground-breaking.

29. The Applicant was under a contractual obligation to disclose any invention that he made during the course of his contract with the fourth respondent but he never did.

DISPUTE OF MATERIAL FACTS

30. In summary without repeating what is on papers, there are number of disputes of facts. In respect of the Applicant`s narration regarding the said invention: they contend it to be “A method for the extraction of ore pillars which method includes the steps of replacing an ore pillar to be mined with a support pillar in its stead”. In that the Applicant started with the theory of a pile of sand becoming an immovable pillar, configured to a specific dimension and density. Knowing of the strength properties of cement and therefore concrete, he then realised that the strength and support resistance capabilities could be drastically increased.
31. Whilst on the other hand the Respondent`s contentions are that an “ore pillar” is a natural pillar containing ore which previously had to remain in situ to prevent the mining tunnel from collapsing. The ore pillar obviously contains valuable ore and it is therefore desirable, commercially, that it be mined. There is, however, a significant safety risk with doing so.
32. The invention of the patent is concerned with a method of replacing the ore pillar with a man-made support pillar. Mining of the ore pillars is only possible, of course, if the support pillar is as effective as the ore pillar in maintaining the structural integrity of the mining tunnel.

33. The Applicant's notion is that this invention is a method for the extraction of ore pillars which method includes the steps of replacing an ore pillar to be mined with a support pillar in its stead.
34. The Respondents in its explanation suggests that the support pillar of the invention is preferably constructed using a cementitious mixture which is pumped into woven geotextile bags. The bags hold the cement in position until cured. To form the support pillar, the bags are stacked on top of one another from the mining floor to the hanging wall (the roof). The bags are further pressurised to ensure sufficient contact with the hanging wall and the floor; and to drain excess water to aid curing, importantly, the pillars are designed such that the width to height ratio of the pillar is at least 5:1.
35. The idea of constructing a concrete pillar to function as a support structure in an underground mine has been known since at least 1999.
36. Applicant differs from the Respondent in that in years gone by, it was common in the mining industry to not mine out 'ore pillars' or "reef pillars" (a portion of reef containing ore) but to leave these pillars in situ. Unmined ore pillars are left in place at certain positions in the underground excavated areas, for the purpose of supporting underground working spaces by preventing the collapse of a hanging wall that arises from excavation in those areas. Underground mining excavations represent a significant threat to the health and safety for all who work there, and it is of cardinal importance to stabilise both the stopes and the hanging walls in underground mining excavations. Further submitted that the available methods to stabilise underground excavations did not adequately address

the necessity to stabilise excavations in underground mining operations.

It was then he decided to develop a satisfactory method.

37. The Respondent submitted that the use of concrete-filled bags to create a concrete pillar has been known since at least 2010. The difficulty with using concrete to replace a natural ore pillar stems from the fact that natural rock has a strength of 180MPa, whereas concrete has a strength of 16MPa.
38. At the heart of the invention of the patent-in-suit is the teaching that a concrete pillar with a width to height ratio of at least 5:1, which is carefully designed, was capable of functioning as a support pillar .This is because the support capabilities of a concrete pillar are a function of the width to height ratio and not (only) material strength.
39. According to the Respondent`s submissions the first applicant did not make the invention which is the subject of the patent.
40. The Applicant contends that he devised the invention as described in the specification of the patent prior to its priority date; the first respondent, claiming to be the patentee of the patent, was never involved in this process; and neither of second or third respondents, the alleged inventors of the patent according to "JEK 2", was involved in inventing the technology described in the specification and claims of the patent.
41. The Respondent argued that if the Applicant had developed an invention which was intended to work as a safety device in a mine, there would be an extensive documentary record showing the development of the device and detailing the tests carried out to determine the safety and effectiveness of the device. At the very least, the Applicant should be able

to produce a write-up of the invention, a diagram showing the way the invention was to work, photographs of rudimentary tests, correspondence with suppliers of raw materials, or something to show that the invention existed in some form, no matter how rudimentary, before 2012.

42. The Applicant is adamant in that he developed the technology for pseudo-support pillars for underground mining operations. In his experience, he determined that this means of support (previously not utilised) was necessary and he developed and invented it as a result of researching several, mostly unsuccessful attempts to produce concrete mat packs or bags which would take the place of timber mat packs as support in underground mining operations.
43. He then started with the theory of a pile of sand becoming an immovable pillar, configured to a specific dimension and density. Knowing of the strength properties of cement and therefore concrete, he then realised that the strength and support resistance capabilities could be drastically increased, which he attended to.
44. The Respondent is adamant that the Applicant did not adduce any supporting document containing a reference to any invention developed by him before 2012. Whilst the Applicant contends that in 2013, he prepared revised his concept paper but had not yet published, a paper in respect of the utilisation of pseudo-pillars as primary and/or secondary support medium when extracting in-stope pillars on Cooke operations, Sibanye Gold. The contents of this draft paper remain confidential and was done by him in his personal capacity.

45. Such was rebutted by the Respondent in that, the Applicant`s description of his idea as a “theory”; and the reference to what he was “developing” puts beyond doubt that the first Applicant had not actually developed an invention in 2012. The first applicant plainly had nothing more than a theory about how a pillar might work.
46. Further contention which is highly disputed by the Respondent is that of the Applicant`s claim to have been an independent contractor, the contract is clearly one of employment.
47. The Applicant submitted that he was never treated as an employee nor was, he considered to be such by Open House. He was not subject to the same application of wage increases or bonuses and, if any wage increases or bonuses were awarded to employees, it was done without his knowledge.
48. His remuneration was clearly specified in clause 6 of the agreement and in the event that he wished to receive a greater compensation for his services, he was required to apply for an increase in his contract rates.
49. It was also stated in some contractual clauses that a consultant will not form part of Open House’s provident fund, further a consultant, will invoice Open House every month for services rendered and . will be liable to pay over all legally required taxes.
50. The Respondent made reference to a number of clauses that suggests that the Applicant was their employee. In that clause 11 refers to “during your employment”; clause 12.1 refers to “before commencement of employment”; clause 12.2 refers to “pre-employment”; clause 12.3 refers to “a condition of employment”; clause 15.1 refers to “by virtue of your

employment with the Company”; clause 15.2 refers to “the period of your employment with the Company” and “to perform your duties as employee of the Company”; clause 15.3 refers to “during the period of your employment with the Company” and “on the termination of your employment with the Company”; clause 16.2 refers to “in the course of carrying out your duties as employee of the Company”; clause 17.1 refers to “the date upon which you cease to be an employee of the Company, for whatever reason”; clause 18 refers to “from date of termination of your employment with the company”; clause 21 refers to “after termination of the employment relationship with you”; clause 22 refers to the right to “terminate your employment as consultant by giving written notice”; clause 23 is titled “Employee duties” and refers to “as an employee of the company” and thereafter lists the duties of the first applicant; clause 27 refers to the “decision whether or not to employ you”; “the terms on which such employment takes place” and “the Company reserves the right to terminate your employment.

51. According to the Respondent, the Applicant only started using (concrete filled) geotextile grout bags after consulting with the Respondent. It doesn't therefore appear from the evidence that the first applicant had built a “pseudo-column”, or a concrete pillar of any description, before 2012. also the Applicant does not refer to any specific width-to-height ratio in his founding affidavit, or mention that it's a necessary feature of a workable concrete support pillar. He did not explain how he invented the “inventive concept” of the patent; or how he went about proving that it was viable.

52. The respondent's contrast, have adduced nearly 100 pages of documentary evidence detailing the trials that they carried out to prove that a concrete pillar could function effectively as a replacement for an ore pillar provided that the width to height ratios were correct.
53. The Applicant also refers to a project at Sappi but provides no detail whatsoever in relation to it. Applicant contended and referred to a declaration made by Mr Evan Cook, the ex-mineral resources manager at Gold One Modder East Operations, South Africa, Evan Cook's declaration is annexed, Evan Cook confirms that he has been employed in various positions as Geologist, Chief Geologist and Mineral Resources Manager for the past 25 years in East Rand mining operations. The Applicant have known Evan for many years and that they discussed confidentially, as long ago as the late 1990's, the utilisation of pillar replacement technology in respect of a project where Black Reef undermined the SAPPI paper plant.
54. In contrast the Respondent avers that the nature of the "pillar replacement technology" was employed at Sappi in the late 1990s is therefore not disclosed. In fact, it's quite clear that this was nothing more than an "idea", which was never proven to be viable.

ANALYSIS

55. The dispute of fact will, more often than not, resort under a wide scope of issues or the eventual scope will be unclear when matters are referred for trial. In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)* it was stated that (except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory

affidavits as opposed to viva voce evidence. The tendency of resorting to affidavits has been denounced ninety years ago by *Tindall, J in Saperstein v Venter's Assignee 1929 TPD 14, P.H. A at [71]* and is still the law. 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.

56. *Harms, Civil Procedure in the Superior Courts, B6.48 Robust approach. President of the Republic of South Africa and Others v M&G Media Ltd 2012 (2) BCLR 181 (CC); [2012] JOL 28167 (CC); 2012 (2) SA 50 (CC) at [34] and Hoffmann v Pension Funds Adjudicator and Others [2012] 2 All SA 198 (WCC) at [23].* Harms, Civil Procedure in the Superior Courts, B6.49 Dismissal. In confirmation of the above; seventy years later in *The National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)* Harms, JP ruled at [26] and [27] that: 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, motion procedures, cannot be used to resolve factual issues because they are not designed to determine probabilities.
57. 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 latter, justify such order.
58. The court may not impose an onus on the respondent to prove a negative. The rule of evidence, namely that if the facts are peculiarly within the knowledge of

a defendant the plaintiff needs less evidence to establish a prima facie case, applies to trials.

59. In motion proceedings the question of onus does not arise and the approach set out in the Plascon Evans-matter governs irrespective of where the legal or evidential onus lies. Finally, the more serious the allegation or its consequences, the stronger must be the evidence before a court before it will find the allegation established. A person claiming relief acts at his peril in proceeding by motion action; he cannot by electing to proceed by motion deprive his opponent of a number of procedural advantages. The flip side is that the respondent may not sabotage the proceedings that is established law for expeditious and cost-efficient resolve of civil cases. A real dispute of fact can arise in one or other of the following ways: Where the court is satisfied that the party who purports to raise the dispute has in his affidavit, seriously and unambiguously, addressed the facts said to be disputed; The respondent may deny one or more of the material allegations made on the applicant's behalf and produce evidence to the contrary, or apply for the leading of oral evidence of witnesses who are not presently available or who, though averse to making an affidavit, would give evidence if subpoenaed; The respondent may admit the applicant's affidavit evidence but allege other facts, which the applicant disputes; The respondent, while conceding that he has no knowledge of one or more material facts stated by the applicant, may deny them and put the applicant to the proof, and himself giving or proposing to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable, or that certain facts upon which the applicant relies to prove the main facts, are untrue. The absence of positive evidence directly contradicting an

applicant's main allegations, does not render a case such as this free of a real dispute of fact. In other words, a respondent is entitled to seek a reference to oral evidence or to trial under circumstances where it is unable to produce affidavits containing positive allegations that prima facie establishes a defence. This requires of the deponent to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Importantly, the deponent must satisfy the court that there are reasonable grounds for believing that the defence would be established. If the respondent's version is farfetched and untenable there is not a dispute. A bare denial is not a dispute.

60. *Mouton v Park 2000 Development 11 (Pty) Ltd 2019 (6) SA 105 (WCC)* summarised the above aptly: At the same time, it is equally well established that where a dispute of fact is not a 'real, genuine or bona fide' one the Court will be justified in ignoring it and may proceed to find on the applicant's version thereof. So too, where the respondent's version is clearly or palpably far-fetched or untenable, the Court may take a robust approach and decide the matter on the basis of the applicant's version. As always, in evaluating the contents of the affidavits the Court must have due regard for the treatment which the respondent has given to the averments under reply. In this respect a respondent has a duty to engage with the facts which are put up by the applicant, and to deal with them fully and comprehensively. Any 'skimpiness' and improbabilities in his version may thus count against him.
61. It is also well-established that when a party deposes to an affidavit (be it an answering or a founding affidavit) he commits himself to its contents, and only

in exceptional circumstances will he be permitted to disavow them.” Both parties committed to the facts in their affidavits and it is clear that there is some sort of an invention and the question is who is the inventor. There are substantial disputes of facts.

62. A real genuine or bona fide dispute of fact must exist. In exercising my discretion, I am required to consider the alleged facts in dispute and see whether real disputes of fact exist which cannot be satisfactorily determined without the aid of oral evidence. The law pertaining to how courts should approach matters where disputes of fact are raised has been settled by our authorities. I am mindful that vague and insubstantial allegations are insufficient to raise the kind of dispute that should be referred for oral evidence.
63. in my view, oral evidence in one or other form envisaged by the rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned. In reaching the decision in this regard facts peculiarly within the knowledge of the applicant which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinized.
64. As alluded to above, a dispute regarding any inventions made by the first applicant in the course and scope of his employment vest in the fourth respondent and that this invention was the result of the respondents’ extensive research and development.
65. I am of the view that reasonable grounds have been proffered by both parties doubting and disputing the originality and functionality of this invention. In my opinion, an application on this basis is not sufficient to resolve this matter on papers. It is not clear though that the Applicant had anticipated a material dispute of fact that could not be resolved on the papers, this court does not find

the actions of the Applicant to be inappropriate, in seeking an order by way of notice of motion. It is important to note though that the dispute of facts arose or was highlighted once the answering affidavit in the above case was filed.

66. This court re-iterates its position in that motion proceedings are about the resolution of legal issues based on common cause facts; they cannot be used to resolve factual issues because they are not designed to determine probabilities. 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 latter, justify such order. In this case facts are totally different with veracity of material disputes.
67. it is trite that motion proceedings are not appropriate for resolution. material disputes of facts. Should a factual dispute arise which is incapable of being resolved in the papers there is a risk of dismissal of the application should the court, in the exercise of its discretion, not refer the matter for trial nor direct that oral evidence be heard on specified issues.
68. A court will exercise a discretion to dismiss the application if the applicant ought to have foreseen, or in fact did foresee, when launching his application, that a serious dispute of fact, incapable of resolution on the papers was bound to develop. I do not think that the Applicant predicted when launching this application that a serious dispute of fact was bound to develop.
69. Mr Marius Steinmann's testimony is necessary as he would be able to confirm that at that time as an employee of Open House, he interviewed the Applicant for this appointment and this interview took place in the first half of 2012, at a restaurant near Carnival City and that during this interview, the Applicant

disclosed to Steinmann information that was of a confidential nature, there is also an affirmation by Steinmann where he confirms that the pillar replacement technology was the technology that the Applicant brought to the 'party' when he joined Open House as a consultant in August 2012. Further, Steinmann also confirms that the pillar replacement technology that the Applicant had developed was never assigned to Open House.

70. Mr Evan Cook`s declaration is also crucial in that the Applicant have known him for many years and that they discussed confidentially, as long ago as the late 1990's, the utilisation of pillar replacement technology in respect of a project where Black Reef undermined the SAPPI paper plant. Mr Evan Cook has been employed in various positions as Geologist, Chief Geologist and Mineral Resources Manager for the past 25 years in East Rand mining operations. It was also submitted that their confidential discussions at that time, revolved around the removal of the reef pillars under the industrial plant, and that he indicated his proposal and concept that such pillars can be removed if they are replaced with equal or better strength support, packed sufficiently to exceed the maximum stresses this is precisely what the pseudo-support pillar concepts contained in the patent in issue, covers.
71. On the issue as to whether the Respondent is an inventor, it is evident that this fact remains disputed and can only be resolved by virtue of oral evidence. I deem it necessary to highlight the discrepancies as they stand on the papers on the said issue: The Applicant`s version is that his concept was not pursued because, at the time, it was not financially viable as a result of the poor gold price; and he was taken aback and upset by the unacceptable, unprofessional

and unethical behaviour of Open House in seeking to appropriate for itself his invention and obtain patent protection.

72. The Respondent`s contends that they have proven that the support pillars could work as replacements for ore pillars, the first respondent filed a patent for the invention as it was entitled to do. Alleging that whatever theories the first applicant may have had about “pseudo-pillars” does not make him an inventor of the patent and does not confer any right on him to apply for a patent. The respondents made the invention because, on their evidence, they are the ones who figured out to make it work.
73. There are these variables and the court cannot conclusively draw an inference based on the different interpretations which appear both in the founding and the answering affidavits.
74. The same approach was adopted in *Transnet Limited v ERF 152927 Cape Town (Pty) Ltd and others*, 6 where the Supreme Court of Appeal Court quoting with approval what was said in *Room Hire CO (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 7 had the following to say: “It is certainly proper that an applicant should commence proceedings by motion with knowledge of the probabilities of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action. As stated in the SAFA matter there are three ways in which a dispute facts of may manifest itself in motion proceedings and those may be summarized as follows: 1) the respondent in the answering affidavit denies one or more of the material allegations made by the applicant in the founding affidavit and produce evidence to the contrary. (2) the respondent admits the allegations made in applicant’s affidavit but allege other

facts which the applicant disputes. (3) the respondent, while conceding that he has no knowledge of one or more material facts stated by the applicant, may deny them and put the applicant to the proof.

75. In the present instance it should be noted that, SATAWU contends that there exist dispute of facts without having properly placed before the Court its answering affidavit. It is important to note that from the above authorities it is not every dispute of fact that would warrant a dismissal of the claim or a referral to oral evidence. It is only a material dispute of fact that would warrant the dismissal of a claim instituted by way of motion proceedings.
76. Therefore, this court finds that this application cannot properly be decided on the affidavits, therefore it stands to be referred for oral evidence . This court will direct that oral evidence be heard on a number of issues with a view to resolving such dispute of facts. There is not a single fact that is not in dispute between the parties before court, apart from the fact that there is an invention.
77. The test for applied in determining disputes of fact is trite. It is the test set out in *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd*. The Plascon-Evans Rule postulates that in deciding disputes of fact in application proceedings, those disputes should be adjudicated on the basis of the facts averred in the founding affidavits which have been admitted by the respondent together with the facts alleged by the respondent, whether or not the latter has been admitted by the applicant unless a denial by the respondent is not such as to raise a real genuine bona fide dispute of fact or a statement in the respondent's affidavit is so far-fetched or clearly untenable that the court is justified in rejecting it

merely on the papers. This approach remains the same irrespective of the question which party bears the onus of proof in any particular case.

78. In terms of section 28 of the Patents Act, 57 of 1978 (the Act). The section confers jurisdiction on this court to determine disputes between persons as to their right to or title in a patent. It also empowers the court to order that a person execute a deed of assignment in respect of the patent if the court declares that a person has a right to the exclusion of any other person to apply for a patent.
79. At this point, even the contractual terms remain in dispute. The Respondent's contention that the Applicant failed to disclose during his time of his employment with the Respondent regarding his invention is still a contentious issue. In the pleadings before me, I am unable to determine the originality of such an invention. I have not been placed in a position to determine the knowledge of the Respondents at the time the Applicant was contracted with them and also the purpose thereof of why the Applicant's services were sought, if the Respondent already had a solution in mind.
80. The Applicant avers that in his confidential deliberations with Rossouw, he reminded him of a project which had been successfully carried out under his guidance years before in 1992 or 1993, and where considerable ore reserves had been removed from the underground mining shafts. This was achieved through utilisation of a support system which had been specifically designed to safely and effectively replace the removed pillars within the stopes. Mr Rossouw testimony is necessary. His evidence should be tested, particularly in cross-

examination. He would be required to clarify what was relayed to the applicant, and explain his responses.

81. Often in motion proceedings the court is required to take a robust common-sense approach to a dispute and should not hesitate to decide an issue on an affidavit merely because it is difficult to do so. However, this approach must be adopted with caution. The court should not be tempted to settle disputes on fact solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of oral evidence. There should be reasonable grounds for doubting the correctness of the allegations raised. I also find it appropriate to highlight what the court stated in *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011 (1) SA 8 SCA at 14 D-E: “In deciding disputed facts in application proceedings a court should always be cautious about deciding probabilities in the face of conflict of facts in the affidavits.
82. However the courts have recognised reasons to take stronger line to avoid injustice. In *Khumalo v Director General Cooperation and Development and Others* 1991 (1) SA 158 A at 167 G to 168 A, where the court cited with approval the conclusions of Kumleben J in *Moosa Brothers and Sons (Pty) Ltd v Rajah* 1975(4) SA 187 D at 93 E-H regarding the approach adopted in applications for referral to oral evidence in terms of Rule 6(5)(g). The passage is worthy of repetition: “(a) As a matter of interpretation there is nothing in the language of Rule 6(5)(g) which restricts the discretionary power of the court to order the cross-examination of a deponent to cases in which a dispute of fact is shown to exist.

Conclusion

83. In light of the disputes raised, it is not possible to determine as to whether the respondent has convincing evidence showing who in fact developed the inventive concept of the patent. More importantly, a mere speculative suggestion that the Applicant did not conceptualise his inventive idea or theory is not sufficient. One needs to establish more than a mere prima facie case or an arguable possibility. A mere speculative suggestion is not enough. More, because it is the applicant who seeks to satisfy the court of the prospect, it must establish that these reasonable grounds in accordance with the rules of motion proceedings which generally speaking, require that it must do so in its founding papers.
84. This court is alive to the fact that this matter has been on the roll since the beginning of 2022, however it feels that should I proceed to adjudicate this matter on the papers before court, it would render a grave injustice to both the parties affected.
85. The Legal Practitioner for the Applicant ought to have foreseen that material disputes of fact would arise in this matter already at the drafting of its papers and would have rather brought the matter as one of action rather than as motion proceedings.
86. The court finds itself between a rock and a hard place. There are simply too many glaring facts in dispute between the parties for the court to be able to determine any of the issue in dispute judicially. This court is required to adjudicate matters in a fair and full manner. Often courts have to decide where the truth lies between two conflicting versions. In this instance, where the said disputes of fact exist, it would not be possible to make a determination on the matter without subjecting the parties to cross-examination. A court may, of

course, after cross-examination still be unable to decide where the truth lies. However, that possibility does not entitle the court to decide the matter without allowing cross-examination.

87. In the premises I make the following order:

1. This matter is referred to trial for oral evidence.
2. Costs of the application are reserved.



BOKAKO AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of Hearing: 16 August 2022

Date of Judgement : 31 January 2023

Appearances

For the Applicant : Advocate Anthonie P. Jansen van Vuuren

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